83-749

No._____

Supreme Court, U.S.
FILED
NOV 4 1983
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

October Term, 1983

FAIRDALE FARMS, INC.,
Petitioner,

vs.

YANKEE MILK, INC.,
and
REGIONAL COOPERATIVE MARKETING AGENCY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FRED I. PARKER, ESQ.
SUSAN F. EATON, ESQ.
LANGROCK SPERRY PARKER
AND WOOL
P.O. Drawer 351
Middlebury, Vermont 05753
(802) 388-6356

KEITH I. CLEARWATERS, ESQ.
Suite 1200
1000 Connecticut Avenue
Washington, D.C. 20036
(202) 785-0048

Counsel for Petitioner

Batavia Times Publishing Co.
Batavia, N.Y. (716) 344-2000

Questions Presented for Review

1. Do the Capper-Volstead and Clayton Acts immunize agricultural cooperatives from the full application of the two-part monopolization test set forth in *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966): (1) the possession of monopoly power in the relevant market and (2) willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident?

2. Is an alleged "marketing agency in common", formed by agricultural cooperatives, federations of cooperatives, and marketing agencies in common, that does nothing more than fix the amount of a premium to be added to the price its members charge, exempted by the Capper-Volstead and Clayton Acts from the prohibitions of Section 1 of the Sherman Act?

3. Assuming *arguendo* that Defendants' monopoly and their price fixing activities are legal, did they violate the antitrust laws by setting an excessively high premium on the price of raw milk, possible only because they had monopoly power, by imposing a premium in some geographic markets and not in others, by giving some handlers exemptions from the premiums and refusing to grant exemptions to others, by using the threat of cut-off of all their producers to enforce collection of a premium imposed on only some of their producers' milk, and by threatening withdrawal of supply without notice to try to force payment of the premium?

TABLE OF CONTENTS.

	Page
Questions Presented for Review	i
Table of Authorities	v
Parties	2
Reported Opinions	2
Grounds for Jurisdiction	2
Statutes	3
Statement of the Case	6
Facts of the Case	7
Prior Proceedings	10
Argument	14
I. These Questions Are Important Issues of Federal Law Which Have Not Been, But Should Be, Decided By This Court	14
A. The Monopolization Question	16
B. The Price-Fixing Question	18
C. The Predatory Practices Issue	21
II. The Court of Appeals' Decisions Conflict With Prior Analysis of the Exemption By This Court	23
Conclusion	25
Notice of Appearance	26
Certificate of Service	27
Appendix—First Opinion and Order of the United States District Court for the District of Vermont	1a
Appendix—First Opinion of the United States Court of Appeals for the Second Circuit	38a
Appendix—Second Opinion of the United States District Court for the District of Vermont	57a
Appendix—Second Opinion of the United States Court of Appeals for the Second Circuit	64a

Page

TABLE OF AUTHORITIES.

Cases:

Alexander v. National Farmers Organization, 687 F.2d 1173 (8th Cir. 1982) 18
Banana Distributors, Inc. v. United Fruit Co., 163 F.Supp. 32 (S.D.N.Y. 1958) 21
Berkey Photo Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979) 21
Carnation Co. v. Pacific Westbound Conference, 388 U.S. 213 (1966) 24
Case-Swayne Co. v. Sunkist Growers, Inc., 369 F.2d 449 (9th Cir. 1966), *rev'd. on other grounds*, 389 U.S. 384 (1967), *reh. denied*, 390 U.S. 930 (1968) 18,24
Federal Maritime Commission v. Seatrain Lines, Inc., 411 U.S. 726 (1973) 23
Kinnett Dairies, Inc. v. Dairymen, Inc., _____ F.2d _____ (11th Cir. 1983), No. 81-7308 18
Lorain Journal Co. v. United States, 342 U.S. 143 (1951) 21
Maryland and Virginia Milk Producers Association v. United States, 362 U.S. 458 (1960) 16,17,24
National Broiler Marketing Association v. United States, 436 U.S. 816, *reh. denied*, 390 U.S. 930 (1978) 19,24
Northern California Supermarkets, Inc. v. California Lettuce Producers Cooperative, 413 F.Supp. 984 (N.D. Cal. 1976), *aff'd. per curiam*, 580 F.2d 369 (9th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979) . 20

Page

Sanitary Milk Producers v. Bergjans Farm Dairy, Inc., 368 F.2d 679 (8th Cir. 1966), *affirming Bergjans Farm Dairy Co. v. Sanitary Milk Producers*, 241 F.Supp. 476 (E.D. Mo. 1965) . . . 17,18,21

Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 8, *reh. denied*, 370 U.S. 965 (1962) 20

Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953) 21

Treasure Valley Potato Bargaining Association v. Ore-Ida Foods, Inc., 497 F.2d 203 (9th Cir. 1974), *cert. denied*, 419 U.S. 99 (1974) 17,20

United States v. Borden, 308 U.S. 188 (1939) . . . 19,23,24

United States v. Container Corporation of America, 393 U.S. 333 (1969) 20

United States v. Grinnell Corp., 384 U.S. 563 (1966) i,6,11,17,18,24

United States v. Philadelphia National Bank, 374 U.S. 321 (1963) 23

United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) 20

Page

Statutes:

Capper-Volstead Act of 1921,
§1, 17 U.S.C. §291 4,11
Clayton Act:
§6, 15 U.S.C. §17 4,11,16
§7, 15 U.S.C. §18 3,11
Cooperative Marketing Act of 1926,
7 U.S.C. §455 5,11
Sherman Act:
15 U.S.C. §1 ..... i,3,10,11,12,19,20
15 U.S.C. §2 3,10,11,12,16,17,23
28 U.S.C. §1254(1) 2,13
28 U.S.C. §1292(b) 12
28 U.S.C. §1337(a) 10

Page

Miscellaneous:

1 Areeda and Turner, *Antitrust Law*, 180..... 18
62 *Cong. Rec.* 2057 (1922)..... 17
Farmer Cooperation Service, U.S. Department of Agriculture, "Cooperative Growth: Trends, Comparisons, Strategy" (F.C.S. Information 87, 1973)..... 15
Farmer Cooperatives, 14 (July 1979)..... 15
Hafstedler, "A Prediction: The Exemption Favoring Agricultural Cooperatives Will Be Reaffirmed", 22 Ad.L.Rev. 455 (1969-1970)..... 21
Hearings on S.4344, before the Senate Committee on the Judiciary, 66th Cong., 2d Sess..... 19
Mahaffie, "Cooperative Exemptions Under the Antitrust Laws: A Prosecutor's View", 22 Ad.L.Rev. 435 (1969-1970)..... 21
Milk Marketing, A Report of the U.S. Department of Justice to the Task Group on Antitrust Immunities (Jan. 1977)..... 21
Note, "Agricultural Cooperatives and the Antitrust Laws: Clayton, Capper-Volstead and Common Sense", 44 Va.L.Rev. 63 (1958)..... 17
Note, "The Agricultural Cooperative Antitrust Exemption—*Fairdale Farms, Inc. v. Yankee Milk, Inc.*", 67 Cornell L. Rev. 396 (1982)..... 16,17
U.S.D.A., *Agricultural Statistics*, 1981..... 22

IN THE

Supreme Court of the United States

No. _____

October Term, 1983

FAIRDALE FARMS, INC.,

Petitioner,

vs.

YANKEE MILK, INC.,
and
REGIONAL COOPERATIVE MARKETING AGENCY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on August 8, 1983.

Parties

The parties are Plaintiff Fairdale Farms, Inc.[1] ("Fairdale") and Defendants Yankee Milk, Inc. ("Yankee") and the Regional Cooperative Marketing Agency ("RCMA"). *Amicus Curiae* briefs were filed in the first appeal to the Second Circuit Court of Appeals by the United States Department of Justice and the National Council of Farmer Cooperatives.

Reported Opinions

The initial District Court Order and Opinion was not officially reported. It was printed in relevant part at 1980-1 CCH Trade Cases, pp. 63,029 (D. Vt. 1979). The first Opinion of the Court of Appeals was reported at 635 F.2d 1037 (2d Cir. 1980), *cert. denied*, 454 U.S. 818 (1981). The second District Court Order and Opinion was not reported. The second opinion of the Court of Appeals has not yet been reported. All opinions are fully set forth in the Appendix submitted with this petition.

Grounds for Jurisdiction

The Judgment sought to be reviewed was entered by the United States Court of Appeals for the Second Circuit on August 8, 1983, in an appeal from the United States District Court for the District of Vermont.

This Court has jurisdiction to review the judgment by a Writ of Certiorari under 28 U.S.C. §1254(1).

---

[1] Fairdale Farms, Inc. has no parent company, no subsidiaries, and no affiliates.

Statutes

Sherman Act (15 U.S.C. §1, §2)

§1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

§2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

Clayton Act, §7 (15 U.S.C. §18)

§18. Acquisition by one corporation of stock of another

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect

of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

Clayton Act, §6 (15 U.S.C. §17)

Antitrust laws not applicable to labor organizations.—The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint or trade, under the antitrust laws.

The Capper-Volstead Act of 1921, §1 (7 U.S.C. §291)

§291. Authorization of associations; powers

Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes. Provided, however, that such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First: That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third: That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.

The Cooperative Marketing Act of 1926 (7 U.S.C. §455)

Exchange of crop information by associations of agricultural producers.—Persons engaged, as original producers of agricultural products, such as farmers, planters, ranchmen, dairymen, nut or fruit growers, acting together in associations, corporate or otherwise, in collectively processing, preparing for market, handling, and marketing in interstate and/or foreign commerce such products of persons so engaged, may acquire, exchange, interpret, and disseminate past, present, and prospective crop, market, statistical, economic, and other similar information by direct exchange between such persons, and/or such associations or federations thereof, and/or by and through a common agent created or selected by them.

Statement of the Case

This Writ is sought to review two decisions of the United States Court of Appeals for the Second Circuit in appeals from the United States District Court for the District of Vermont. These decisions resulted in Final Judgment being entered against the Plaintiff-Petitioner in this matter on August 8, 1983.

In its first decision on December 9, 1980, in an interlocutory appeal, the Court of Appeals vacated in part the opinion of the District Court on motions for summary judgment in this antitrust case. The Court held it improper for the District Court to apply to agricultural cooperatives the monopolization standard of *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966), applicable to ordinary business corporations, holding instead that such cooperatives are immune under the Capper-Volstead Act from Sherman Act liability absent evidence of predatory behavior. The Court of Appeals further held, affirming the District Court, that price fixing by a group of agricultural cooperatives is also exempt from antitrust liability, even though the group engages in no inter-cooperative activities other than setting the price at which the members sell their product. The case was remanded to the District Court to determine whether Fairdale had raised a genuine issue of material fact as to predatory practices by the Defendants.

On remand, the District Court ruled that Fairdale had not raised any genuine issues of material fact on the issue of predatory practices, and entered summary judgment against the Plaintiff. The Court of Appeals, in its August 8, 1983 opinion, held that the conduct complained of by the Plaintiff was not predatory and entered final judgment against Fairdale.

Facts of the Case

This matter came before the courts on motions for summary judgment. The facts stated herein are those presented in sworn discovery responses and depositions.

Plaintiff Fairdale Farms, Inc., is an employee-owned corporation located in Bennington, Vermont, that processes raw milk and sells its fluid milk and milk products to supermarkets and other outlets in Vermont, Massachusetts and eastern New York. Fairdale obtains raw milk for processing from its own dairy herd and from individual producers located in the surrounding three county areas of Bennington County, Vermont, Berkshire County, Massachusetts, and Rennselaer County, New York.

Defendant Yankee Milk, Inc.,[2] is an agricultural cooperative composed of dairy farmer members that purchases raw milk from its members under contract and sells this milk to processors such as Fairdale. Yankee has had up to approximately 6,000 producer members and between 350 and 450 employees. It operates in 7 states, and in 1974 and 1975 its members produced approximately 3 billion pounds of milk per year.[3] During the fiscal year ending June 20, 1974, Yankee's operations resulted in sales of over a quarter billion dollars.

Yankee was formed in 1972 by the merger of the three largest New England dairy farmer cooperatives, for the stated purpose of obtaining market strength.

---

[2] The facts are stated herein as they were during the pertinent times covered by this litigation. There have been dramatic changes in Defendant Yankee Milk, Inc., which, through additional mergers and purchases, has now become Agri-Mark, Inc.

[3] A comparison of the relative size of the parties can be made by comparing this figure with the 22 million pounds of milk processed by Fairdale in 1977.

Immediately after the merger, Yankee controlled the following market shares:

Massachusetts	-71% of milk produced
Vermont	39%
Maine	70%
New Hampshire	79%
Rhode Island	87%
Connecticut	77%
New York	5%

Shortly thereafter, another large cooperative (Dairylea, Inc.) pledged to Yankee control of 1,600 of its New England dairy farmers.

Defendant Regional Cooperative Marketing Agency ("RCMA") is an organization of dairy farmer cooperatives (including Yankee), two federations of dairy farmer cooperatives (one having 50 cooperatives as members), and a common marketing agency representing two of RCMA's member cooperatives. It was formed in 1973 in order to raise milk prices after the federal government concluded that price increases were not warranted. RCMA has had up to eight members who represent some 26,000 dairy farmers in a nine state region. These farmers produce a major portion of the raw milk for three federal regulatory markets and two state regulatory markets. All RCMA member cooperatives are also engaged in processing dairy products and/or fluid milk. RCMA's attorney conceded in oral agrument before the Court of Appeals that RCMA is a "monopolist", albeit an allegedly "legal" one.

RCMA's sole function, and the purpose for which it was formed, was to fix the price at which its members sell their milk in certain New England and New York markets. It did not itself engage in any of the collective

functions its member cooperatives performed on behalf of their members, such as marketing, billing, handling or processing. Rather, RCMA members met monthly to decide on the amount of a "premium" (or "over-order price") the members would charge milk processors such as Fairdale on raw milk. The individual members billed and collected the premium, which was in addition to the usual cooperative service charges and was billed separately. During the three years in which the premium was charged, RCMA members collected over twenty million dollars in premiums. During 1974, the premium was at a level which Fairdale's economic expert characterized as predatory.

Yankee and RCMA acquired enough market power not only to raise RCMA members' prices, but also to affect prices so substantially within Vermont and Maine that the state regulatory agencies raised their prices to prevent disorder within the market. Also, other small cooperatives that were not RCMA members were able to ride on its coattails and collect over-order prices for their producers. RCMA and Yankee did not charge the premium in the large New York-New Jersey federal order market where it did not have monopoly power.

At the time this dispute arose, Yankee controlled more than 57 to 67 percent and RCMA controlled more than 86 percent of raw milk in the three county area from which Fairdale procured its milk. Some 40 percent of Fairdale's milk supply came from producers who were members of an RCMA member cooperative and virtually the only non-RCMA farmers in Fairdale's procurement area were Fairdale's own dairy and the "independents" from whom it was already purchasing raw milk.

The dispute between the parties arose in the fall of 1974, when Fairdale refused to pay Yankee the RCMA

premium. Yankee responded that it was "pulling" (stopping shipment of) all its producers' milk that went to Fairdale (including those in Vermont and New York), even though the disputed premium was imposed on only the Massachusetts producers' milk. Although, upon Fairdale's request, Yankee agreed to discuss the matter, it at one point instructed its producers to withhold immediately their milk from Fairdale. Experts for Fairdale and Yankee agreed that a pull order without notice was unheard of in the milk industry because daily raw milk supply is absolutely essential to a milk processor who must meet daily supply commitments to its customers. Thus, although the "pull-order" was rescinded, Fairdale knew it to be a clear threat that Yankee would use its dominant market position to force Fairdale to accept the premium. With this cut-off threat hanging over Fairdale, negotiations to find an acceptable basis for continued shipment failed, and business relations were terminated as of January 1, 1975.

As a result of these actions, Fairdale incurred damages such as the extra cost of purchasing milk at spot milk prices from distant sources to cover its needs until it was able to develop other producer sources and the ongoing costs involved in purchasing milk from new producers located outside its usual procurement area. In addition, Fairdale lost a major supermarket account because, with the unreasonably high price it was paying for its milk, it was unable to maintain its price at competitive levels.

Prior Proceedings

Fairdale filed an Amended Complaint in this action[4] on June 4, 1976, alleging that RCMA and Yankee violated Sections 1 and 2 of the Sherman Act (15 U.S.C. §1 and

[4] Jurisdiction was founded on 28 U.S.C. §1337(a).

§2) and Section 7 of the Clayton Act (15 U.S.C. §18), by price-fixing, attempting to monopolize, monopolization, and anticompetitive mergers. RCMA and Yankee rely on Section 6 of the Clayton Act, 15 U.S.C. §17, the Capper-Volstead Act, 17 U.S.C. §291, and Section 5 of the Cooperative Marketing Act, 7 U.S.C. §455, as defenses to their acts.

The case came before the District Court on motions for summary judgment. All parties moved for summary judgment on Count I (the price fixing count) and Yankee and RCMA moved for summary judgment on Count II (the monopolization count).

In their motion on the monopolization count, Defendants argued that the Capper-Volstead Act immunized them from Sherman Act Section 2 liability unless Fairdale could show that they engaged in predatory practices. The District Court, however, denied the motion for summary judgment on the monopoly charge, holding that a cooperative or group of cooperatives were entitled to no greater protection than were ordinary business corporations which, under the definition of monopolization set forth in *U.S. v. Grinnell Corp.*, 384 U.S. 563 (1966), could be liable for a violation of Section 2 without a specific showing of predatory conduct. Under *Grinnell*, two elements were required for proof of monopolization: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Id.* at 570-71. Refusing to agree "with Defendants' assertion that the Capper-Volstead Act adds to the elements of a monopoly claim when it is brought against a qualified cooperative," the District Court

stated that "a plaintiff claiming an agricultural cooperative has violated section 2 has no greater burden than if he sued a corporation."

Under the cross-motions for summary judgment on the price fixing count, Fairdale argued that RCMA, whose sole function was to fix the price at which its members would sell their milk, was not engaged in "marketing" or any other collective activity specified in the Capper-Volstead Act, and thus this inter-cooperative combination formed solely for the purpose of price fixing was a *per se* violation of Sherman Act Section 1. Although the District Court agreed that RCMA did nothing more than fix prices, it held that the Capper-Volstead Act immunized such activity from attack under Section 1 of the Sherman Act, and granted Defendants' summary judgment motion on the price fixing count.

Pursuant to certification by the District Court and permission by the Court of Appeals for the Second Circuit, the parties took interlocutory cross-appeals on these questions in accordance with 28 U.S.C. §1292(b). The Court of Appeals affirmed the District Court on the price fixing count, holding that such activity was immunized by the Capper-Volstead and Clayton Acts. The Court reversed and vacated the District Court's opinion on the monopolization count, ruling that agricultural cooperatives are immune from antitrust liability absent evidence of predatory behavior. The Court stated:

> By exempting farmers from Sherman Act limitations on the ability to combine into cooperatives, Capper-Volstead gives farmers the right to combine into cooperative monopolies. . . .
>
> Thus, while the formation, growth and operation of a powerful cooperative is obviously a "willful

> acquisition or maintenance of such power," and will rarely result from "a superior product, business acumen, or historic accident," *Id.*, it is exactly what Capper-Volstead permits.
>
> We conclude that *Grinnell* does not apply to monopoly power that results from such acts as the formation, growth and combination of agricultural cooperatives, but applies only to the acquisition of such power by other, predatory means. It is not a violation of the Sherman Act for the members of an agricultural cooperative to carry out the legitimate objectives of their association which follow naturally from their attempts to achieve unity of effort and the voluntary elimination of competition among themselves.

635 F.2d at 1040, 1045. In this way the Court resolved what it perceived to be the conflict between the Capper-Volstead exemption and the Sherman Act principles in favor of cooperatives, finding them to be a "favorite child of Congressional policy." 635 F.2d at 1043. The Court remanded the case to the District Court to determine whether Fairdale had alleged sufficient predatory acts to survive the summary judgment motions.

Fairdale petitioned this Court for Certiorari pursuant to 28 U.S.C. §1254(1) and, after requesting a position from the Department of Justice, the Court denied certiorari on the interlocutory appeal. 454 U.S. 818 (1981).

On remand Fairdale complained that the following conduct by the Defendants was illegal activity in furtherance of their monopoly:

1. Yankee's decision to pull not only the producers on whose milk the premium was disputed but also those whose milk was not part of the dispute.

2. Yankee's refusal to give assurances of a reasonable notice of cancellation.

3. Because of Defendants' monopoly, the high level of the premium constituted predation on buyers.

4. The premium was charged in some geographic areas and not in others and to some processors and not to others.

The District Court held that Fairdale had not raised a genuine issue as to any fact material to the question of whether Defendants engaged in predatory conduct. Plaintiff appealed this determination to the United States Court of Appeals for the Second Circuit. The Court of Appeals affirmed the District Court's decision.

ARGUMENT

I. These Questions Are Important Issues of Federal Law Which Have Not Been, But Should Be, Decided By This Court.

We respectfully submit that this Court should grant a Writ of Certiorari to determine whether the Court of Appeals correctly extended the Capper-Volstead and Clayton Act exemptions to immunize conduct by agricultural cooperatives which would have subjected ordinary business corporations to liability under the antitrust laws. This is an important question of federal law which is especially pressing given the recent growth of some agricultural cooperatives, particularly associations of milk producers, to positions of absolute

economic dominance in their product markets.[5] In addition, we submit that the Federal Courts of Appeals have rendered inconsistent decisions regarding the monopolization question, and the need for a uniform and conclusive ruling is manifest. Finally, Petitioner suggests that the Court of Appeals abandoned a fundamental rule of construction enunciated by this Court requiring that courts construe narrowly legislatively-granted antitrust immunities when they conflict with the Sherman Act.

The import of the Fairdale decisions is that an agricultural cooperative may now deliberately seek and attain monopoly power and band together with other cooperatives to set uniform prices at high levels. What is clearly not allowed for "widgets" is allowed for the vital commodity of food. Thus, the issues raised are not only significant legally, since they involve basic issues of the limits the Capper-Volstead Act places on the Sherman Act, but they are also significant in terms of public policy because abundant and reasonably priced food products is a public necessity.

A definitive ruling on this issue would benefit the lower courts and future litigants. These are issues which involve considerable analysis and briefing. This case is now over 8 years old and was stymied for years because of a lack of a definitive answer to very basic questions of interpretation of the Capper-Volstead Act. If certiorari is granted, courts and litigants will have clear guidance on

---

[5] Seven cooperatives were listed in the Fortune 500 in 1978. *Farmer Cooperatives* 14 (July 1979). Regional cooperatives accounted for between 71% and 100% of sales in the following commodities in 1973: sugar (100%), tobacco (100%), nuts (96%), livestock and products (88%), cotton and products (76%), dairy products (75%), rice (74%), poultry products (73%), and beans and peas (71%). Farmer Cooperation Service, U.S. Dept. of Agriculture, "Cooperative Growth: Trends, Comparisons, Strategy" 25 (F.C.S. Information 87, 1973).

these issues rather than years of uncertainty over difficult and taxing questions.

A "nutshell" review of the state of the law on the three questions demonstrates the significance of the issues raised in this case.

A. The Monopolization Question

Fairdale argued below that nothing in the text of Section 2 or the Capper-Volstead Act suggests that predatory practices are an essential element of a Section 2 claim. The Sherman Act makes it illegal for persons to monopolize, attempt to monopolize, or combine with others to monopolize trade or commerce. The Capper-Volstead Act, on the other hand, merely permits farmers, including dairy farmers, to join together in cooperative associations for the purpose of processing, handling, or marketing their product. The legislative history of the Capper-Volstead Act demonstrates that Congress did not intend to give agricultural cooperatives special status as compared to other business entities. Capper-Volstead was enacted only to clarify the exemption from the antitrust laws granted to agricultural cooperatives by the Clayton Act, and to ensure that farmers would be able to compete with corporations.[6] Thus, Fairdale argued the Act's purpose was simply to give cooperatives the same privileges enjoyed by corporations.[7]

---

[6] For a helpful review of the Capper-Volstead Act's legislative history, *see, Maryland and Virginia Milk Producers Association v. United States*, 362 U.S. 458, 465-67 (1960); *see also*, Note, "The Agricultural Cooperative Antitrust Exemption—*Fairdale Farms, Inc. v. Yankee Milk, Inc.*", 67 Cornell L. Rev. 396, 407-410 (1982).

[7] See *Maryland and Virginia Milk Producers Association v. United States*, 362 U.S. 458, 466-67 (1960) ("We believe it is reasonably clear from the very language of the Capper-Volstead Act, as it was in §6 of the Clayton Act, that the general philosophy of both was simply that

The leading case before this Court dealing with the extent of the cooperative immunity from Section 2 of the Sherman Act involved unquestionably predatory practices, which this Court held to be unprotected. *Maryland and Virginia Milk Producers Association v. United States*, 362 U.S. 458 (1960). Therein, this Court stated that "the [Capper-Volstead] Act did not leave cooperatives free to engage in practices against other persons in order to monopolize trade, or restrain and suppress competition with the cooperative." 362 U.S. 458, 467. *Maryland and Virginia* has been followed by a series of cases in the lower federal courts, cited by the Court of Appeals in this case, which also involve patently predatory practices. These cases do not directly reach the issue presented here.

Although no previous cases have addressed squarely the issue of whether the *Grinnell* standard is applicable to agricultural cooperatives,[8] decisions in the Ninth and Eighth Circuit Courts of Appeals indicate that the *Grinnell* test does, in fact, apply to agricultural cooperatives. *See Treasure Valley Potato Bargaining Association v. Ore-Ida Foods, Inc.*, 497 F.2d 203, 209 (9th Cir. 1974) (directly citing and applying *Grinnell*); *Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.*,

---

individual farmers should be given, through agricultural cooperatives acting as entities, the same unified competitive advantage—and responsibility—available to businessmen acting through corporations as entities.") See also 62 *Cong. Rec.* 2057 (1922) (remarks of Senator Capper: The purpose of the Act is "to give the farmer the same right to bargain collectively that is already enjoyed by corporations.").

[8] Commentators have urged the application of the *Grinnell* test to agricultural cooperatives. See Note, "Agricultural Cooperatives and the Antitrust Laws: Clayton, Capper-Volstead and Common Sense", 44 Va. L. Rev. 63, 69 (1958); Note, "The Agricultural Cooperative Antitrust Exemption—*Fairdale Farms Inc. v. Yankee Milk, Inc.*", 67 Cornell L. Rev. 396, 413-14 (1982).

368 F.2d 679 (8th Cir. 1966), *affirming Bergjans Farm Dairy Co. v. Sanitary Milk Producers*, 241 F.Supp. 476, 485 (E.D. Mo. 1965) (undertaking willful acquisition analysis); *Case-Swayne Co. v. Sunkist Growers, Inc.*, 369 F.2d 449 (9th Cir. 1966), *rev'd on other grounds*, 389 U.S. 386 (1967), *reh. denied*, 390 U.S. 930 (1968) (citing and applying *Grinnell*). These cases conflict with the decision of the Court of Appeals.

Commentators have lamented the lack of definitive rulings on the question of the permissible extent of cooperative market power. Areeda and Turner in their treatise note "the critical question, on which there is surprisingly little authority, of whether the antitrust laws limit a cooperative's market power."[9]

Thus, the Court of Appeals decision is a highly significant authorization of monopolistic behavior by the Defendants and other agricultural cooperatives. Not only does this ruling adversely affect processors, consumers, and unaffiliated farmers, but it has already been cited as authoritative by other courts. *See, e.g., Kinnett Dairies, Inc. v. Dairymen, Inc.*, ____ F.2d ____ (11th Cir. 1983), No. 81-7308, Slip Op. at 2; *Alexander v. National Farmers Organization*, 687 F.2d 1173, 1182-83 (8th Cir. 1982).

B. The Price Fixing Question

This case is the first to present the clear issue of whether a group of cooperatives may establish a meeting ground solely to raise prices if they perform no other collective marketing activity. RCMA did not engage in any collective marketing activity such as negotiating or dealing with the handlers to whom its member

[9] Areeda and Turner, *Antitrust Law*, 180.

cooperatives sold milk. Its members were, with few exceptions, entirely separate cooperative entities which carried on all their functions separately. RCMA's activities, then, had none of the advantages, such as cost savings and economies of scale, inherent in true joint processing and marketing activity. Fairdale argued below that price fixing is permissible only where it is *inherent in other collective marketing activity.* Yankee and RCMA argued that the Capper-Volstead Act immunizes price fixing activity from the reach of the Sherman Act. This issue raises serious policy concerns which require harmonizing the Capper-Volstead Act with the antitrust laws.

A resolution of the issue turns on statutory interpretation. Fairdale argued that nothing in the language of the Capper-Volstead Act, which refers only to "collective processing, preparing for market, handling and marketing" and "marketing agencies in common", specifically authorizes bald price fixing. The legislative history also suggests that price fixing was not authorized by the Act.[10]

This Court has previously dealt with two aspects of liability under the Sherman Act Section 1 for Capper-Volstead entities—combination with a non-Capper-Volstead entity, which is not exempt,[11] and "conspiracy"

[10] In reporting the bill to the Judiciary Committee, Senator Walsh of Montana stated: "[The Capper-Volstead bill] does not reach to agreement between individuals for the purpose of fixing prices, nor does it apparently reach to agreements between independent associations for the purpose of fixing prices. It simply refers to associations themselves." Hearings on S. 4344, before the Senate Committee on the Judiciary, 66th Cong., 2d Sess., at 43.

[11] *U.S. v. Borden*, 308 U.S. 190 (1939); *National Broiler Marketing Association v. United States*, 436 U.S. 816, *reh. denied*, 390 U.S. 930 (1978).

by Capper-Volstead entities which were found to be, for practical purposes, the same organization, which is exempt.[12]

This case presents a different situation—a combination of several Capper-Volstead entities which are all (with the exception of the marketing agency and the two cooperatives it markets for) entirely separate entities having separate members, who came together solely for the purpose of price fixing.[13]

Defendants and the Court of Appeals relied on two Ninth Circuit Court of Appeals cases in which the Court approved certain price fixing behavior by Capper-Volstead entities. These cases involved fact situations which fall short of the instant case. In *Treasure Valley Potato Bargaining Association v. Ore-Ida Foods, Inc.*, 497 F.2d 203 (9th Cir.), *cert. denied*, 419 U.S. 99 (1974), the bargaining cooperatives, in their negotiations with the buyers, were, as a practical matter and with each other's consent, actually also bargaining for the other; thus the price fixing was incidental to the joint bargaining activity. In *Northern California Supermarkets, Inc. v. California Lettuce Producers Cooperative*, 413 F.Supp. 984 (N.D. Cal. 1976), *aff'd. per curiam*, 580 F.2d 369 (9th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979), the cooperative was an organization of individual producers, not cooperatives, and actually engaged in promotional and numerous other activities on behalf of its members. Thus, the actual holding of these

---

[12] *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 8 at 29, *reh. denied*, 370 U.S. 965 (1962).

[13] If the cooperatives were treated as individual business corporations, this sort of collective price fixing clearly would constitute a *per se* violation of Section 1. *United States v. Container Corporation of America*, 393 U.S. 333 (1969); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

cases was that the coordinated activity falls within the ambit of protection afforded by Capper-Volstead. The instant case, in contrast, involves an organization of cooperatives which has no joint activity except price fixing.

Again, there is a lack of authority on this very crucial issue. One commentator, complaining that the law concerning the exception is "extraordinarily undeveloped", pointed particularly to the lack of authority on the question of agreements between cooperatives.[14] Another notes the lack of "court comment" on the power of producers and associations of producers to have marketing agencies in common.[15] The Department of Justice's 1977 study on milk marketing also noted that the law on marketing agencies in common needed to be clarified.[16]

C. The Predatory Practices Issue

There is very little case law on what conduct lawful monopolists may engage in.[17] Discussion of this issue in cases heretofore has been limited to attempts by monopolists to use their monopoly over one product to establish a monopoly over another product or in another geographical area.[18] This case on the other hand involves

[14] Mahaffie, "Cooperative Exemptions Under the Antitrust Laws: A Prosecutor's View", 22 Ad.L.Rev. 435, 441-442 (1969-1970).

[15] Hafstedler, "A Prediction: The Exemption Favoring Agricultural Cooperatives Will Be Reaffirmed", 22 Ad.L.Rev. 455 at 463-465.

[16] *Milk Marketing, A Report of the U.S. Department of Justice to the Task Group on Antitrust Immunities*, 583-85 (Jan. 1977).

[17] Fairdale assumes, *arguendo*, for this question that Defendants' monopoly and price fixing activities are legal.

[18] *See Lorain Journal Co. v. United States*, 342 U.S. 143, 155 (1951); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953); *Banana Distributors, Inc. v. United Fruit Co.*, 163 F.Supp. 32 (S.D.N.Y. 1958); *Berkey Photo Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275 (2d Cir. 1979); *Bergjans Farm Dairy Co. v. Sanitary Milk Producers*, 241 F.Supp. 476 (E.D. Mo. 1965), *aff'd.* 368 F.2d 679 (8th Cir. 1966).

monopolists taking full advantage of their monopoly position to set and extort excessive prices from their customers. The Court of Appeals' focus on whether the conduct was strictly anticompetitive in the sense of injuring Defendants' competitors missed the point, since by definition a monopolist has no effective competition.

Most legal monopolists in this country, such as power companies and telephone companies, are regulated in the uses of their power, *e.g.*, by rate setting authorities. Federal and state regulation of raw milk, however, sets only minimum prices. If the Capper-Volstead Act and the Sherman Act do permit monopolies of agricultural cooperatives, do they impose limitations on the conduct of those monopolies? This question can be answered either within the definition of "predatory practices" or "anticompetitive conduct" or by defining a new standard.

This issue is especially significant because it applies not only to cooperatives such as those here which deliberately set out to acquire monopoly power in order to obtain higher prices, but also to those which may acquire their power through superior product, business acumen, or historic accident. It is also especially important to milk processors, whose numbers are declining at a much higher rate than dairy farmers,[19] and who, like Fairdale, suffer severe economic hardship when the monopolist refuses to deal with them on a reasonable commercial basis.

---

[19] U.S.D.A., *Agricultural Statistics*, 1981, p. 371.

II. The Court of Appeals' Decisions Conflict With Prior Analysis of the Exemption by This Court.

The decisions of the Court of Appeals abandon rules of construction enunciated by this Court concerning antitrust exemptions, including the Capper-Volstead Act.

In its first Capper-Volstead case, *United States v. Borden*, 308 U.S. 188, 198 (1939), involving price fixing agreements between cooperatives and other entities not covered by Capper-Volstead, this Court stated: "It is a cardinal principle of statutory construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible." 308 U.S. at 198. Other decisions of this Court have emphasized that repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, that statutory exemptions from antitrust laws are to be construed narrowly, and that immunity from these laws is not lightly implied. *See, e.g., Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973); *United States v. Philadelphia National Bank*, 374 U.S. 321, 348 (1963).

In the instant case, however, rather than narrowly construing the exemption or reconciling it with the Sherman Act, the Court of Appeals found that "there is an inherent conflict between this provision (Sherman Act §2) and those of Capper-Volstead." 635 F.2d at 1040. The Court resolved this conflict in favor of broadly construing the exemption, on the theory that agricultural cooperatives are "a favorite child of Congressional policy." 635 F.2d at 1043. The Court of Appeals thus disregarded numerous pronouncements by this Court to the effect that the "antitrust laws represent a fundamental national economic policy", and courts should "not lightly assume that the enactment of a

special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry." *Carnation Co. v. Pacific Westbound Conference*, 388 U.S. 213, 218 (1966). More specifically, the Court of Appeals ignored statements by this Court that the agricultural cooperative antitrust exemptions are limited in nature. *See, e.g., National Broiler Marketing Association v. United States*, 436 U.S. 816, 828-29 (1978); *Case-Swayne Company v. Sunkist Growers, Inc.*, 389 U.S. 384 (1967), *reh. denied*, 390 U.S. 930 (1968); *Maryland and Virginia Milk Producers Association v. United States*, 362 U.S. 458 (1960); *United States v. Borden*, 308 U.S. 188, 193 (1939).

The Court of Appeals also abandoned the reasoning of this Court in *Maryland and Virginia Milk Producers Association v. United States*, 362 U.S. 458 (1960), wherein it stated:

> We believe it was reasonably clear from the very language of the Capper-Volstead Act, as it was in §6 of the Clayton Act, that the general philosophy of both was simply that individual farmers should be given through agricultural cooperatives acting as entities, the same unified competitive advantage—and responsibility—available to businessmen acting through corporations as entities. 362 U.S. at 466.

Ignoring this interpretation of the extent of the exemption, the Court of Appeals chastised the District Court for subscribing to the corporate monopolization test of *Grinnell* and "disregarding the fundamental differences between a cooperative and a corporation." 635 F.2d 1040.

In sum, the above pronouncements of this Court limiting the scope of statutory antitrust exemptions generally and of the Capper-Volstead Act in particular indicate that the Court of Appeals should have been more circumspect in its delineation of the extent of the Capper-Volstead exemption in the factual situation presented by this case.

Conclusion

For the foregoing reasons, Petitioner respectfully requests that its Petition for a Writ of Certiorari be granted.

Respectfully submitted,

FAIRDALE FARMS, INC.
By: FRED I. PARKER, ESQ.
SUSAN F. EATON, ESQ.
LANGROCK SPERRY PARKER and WOOL
P.O. Drawer 351
Middlebury, Vermont 05753
802-388-6356

By: KEITH I. CLEARWATERS, ESQ.
Suite 1200
1000 Connecticut Avenue
Washington, D.C. 20036
202-785-0048

Notice of Appearance

IN THE

Supreme Court of the United States

October Term, 1983

No._____

FAIRDALE FARMS, INC.,

Petitioner,

vs.

YANKEE MILK, INC.,
and
REGIONAL COOPERATIVE MARKETING AGENCY,

Respondents.

NOW COME, Fred I. Parker, Esq. and Susan F. Eaton, Esq. of the law firm of Langrock Sperry Parker and Wool, and Keith I. Clearwaters, Esq., and appear for the Petitioner, Fairdale Farms, Inc., in the above captioned matter.

DATED this 4th day of November, 1983.

LANGROCK SPERRY PARKER and WOOL
By: FRED I. PARKER, ESQ.
SUSAN F. EATON, ESQ.
P.O. Drawer 351
Middlebury, Vermont 05753
(802) 388-6356

KEITH I. CLEARWATERS, ESQ.
Suite 1200
1000 Connecticut Avenue
Washington, D.C. 20036

Certificate of Service

I, Fred I. Parker, Esq., member of the firm of Langrock Sperry Parker and Wool, P.O. Drawer 351, Middlebury, Vermont 05753, attorney for the Petitioner in the above entitled cause, and member of the Supreme Court of the United States, hereby certify that on the 4th day of November, 1983, I served copies of the foregoing Petition for a Writ of Certiorari and all appendices attached thereto and our Notice of Appearance on Yankee Milk, Inc. and Regional Cooperative Marketing Agency, by mailing three copies thereof, in duly addressed envelopes with first class postage pre-paid, to the attorneys of record for said Respondents, Thomas D. Clifford, Esq., Shipman & Goodwin, 799 Main Street, Hartford, Connecticut 06103 and David P. O'Hara, Esq., Bond, Schoeneck and King, One Lincoln Center, Syracuse, New York 13202, and three copies to the following: Donald E. Graham, Counsel of Farmer Cooperative, 1800 Massachusetts Avenue, N.W., Washington, D.C. 20036 and Barry Grossman, Department of Justice, Washington, D.C. 20530.

FRED I. PARKER, ESQ.
LANGROCK SPERRY PARKER and WOOL
P.O. Drawer 351
Middlebury, Vermont 05753
(802) 388-3656

APPENDIX

First Opinion and Order of the United States District Court for the District of Vermont

UNITED STATES DISTRICT COURT

For the District of Vermont

FAIRDALE FARMS, INC.,

v.

YANKEE MILK, INC., and
REGIONAL COOPERATIVE MARKETING
AGENCY, INC.

YANKEE MILK, INC.,

v.

FAIRDALE FARMS, INC.

Civil Action File No. 75-140

The Capper-Volstead Act, 7 U.S.C. §291, allows farmers to organize cooperatives to strengthen their bargaining power in the markets where they sell their produce. This case raises questions about the scope of the protection this statute affords dairy cooperatives from suit under the federal antitrust laws. Plaintiff Fairdale Farms, Inc. (Fairdale) charges in its two count Amended Complaint that the defendant cooperatives, Yankee Milk, Inc. (Yankee) and Regional Cooperative Marketing Agency, Inc. (RCMA), have fixed prices and

monopolized the market in which Fairdale buys its raw milk. Defendants have moved for summary judgment on both counts; plaintiff seeks summary judgment on Count I, its price-fixing claim. We grant defendants' motions on Count I and deny plaintiff's; we decline to give judgment on the monopoly claim and therefore deny (illegible).

Facts

Fairdale is what is known in the dairy industry as a "handler" which produces some of its own milk but primarily buys milk from local farmers, processes it and distributes it to retailers. Yankee is a cooperative incorporated in Connecticut and composed of several thousand dairy farmers, or producers, from all over New England. Before this suit, many of Yankee's members sold their milk to Fairdale. The Secretary of Agriculture has determined and the parties do not dispute that Yankee qualifies for the protection afforded by the Capper-Volstead Act. RCMA is an entity created in June, 1973, by seven northeastern dairy cooperatives, including Yankee, to fix the prices at which the cooperatives would sell their milk and to distribute among the cooperatives the additional income resulting from that price fixing. Membership in RCMA is limited to cooperatives that meet the requirements of the Capper-Volstead Act.

In the northeast, both the Secretary of Agriculture and state agencies regulate the price of raw milk by imposing floors under the price handlers must pay producers. Nevertheless, in 1973 and 1974 producers faced rapidly increasing production costs that were not being met by rises in the regulatory floors. To protect their members

from this cost-price squeeze, seven cooperatives formed RCMA which in September, 1973, set a price for its members' milk above the federal floor (the production incentive differential). Fairdale balked at paying this price and eventually stopped purchasing milk from Yankee members, because it feared that Yankee would interrupt its supply from the member-producers without adequate notice. This suit followed the breakdown in the Fairdale-Yankee relationship.

Discussion

1. Count I: Price Fixing.

Count I of the Amended Complaint alleges that defendants have violated section 1 of the Sherman Act, 15 U.S.C. §1, by fixing the price of raw milk. Since price fixing is a *per se* violation of section 1 of the Sherman Act, *see United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940), and defendants have conceded that RCMA was organized to facilitate agreement on price among the member cooperatives and has fixed prices; plaintiff asserts that it is entitled to judgment on Count I. Defendants argue that both Yankee and RCMA qualify for the protection of the Capper-Volstead Act[1] which they claim permits agricultural cooperatives to fix prices notwithstanding the federal antitrust laws; they also seek judgment as a matter of law.[2] Plaintiff does not contest that Yankee may fix the price its own members charge, but Fairdale does object to the claim that the Capper-Volstead Act also protects RCMA's activity. Thus the resolution of the cross-motions for summary judgment on Count I turns on the application of the Capper-Volstead Act to RCMA and the functions it performs.

The court is satisfied that Congress intended this Act to protect organizations like RCMA, which are composed of qualified cooperatives, to the same extent as the cooperatives themselves; RCMA is either an "association" or a "marketing agen[t] in common." 7 U.S.C. §291. *See Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29 (1962) (refusal "to impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect"); *Treasure Valley Potato Bargaining Association v. Ore-Ida Foods, Inc.*, 497 F.2d 203, 213-17 (9th Cir.), *cert. denied*, 419 U.S. 999 (1974) (cooperation between two cooperatives in negotiating contracts with buyers protected); *Case-Swayne Co. v. Sunkist Growers, Inc.*, 355 F. Supp. 408, 415 (C.D. Cal. 1971) (cooperative of growers and smaller cooperatives protected); *United Egg Producers v. Bauer International Corp.*, 312 F. Supp. 319, 320 (S.D.N.Y. 1970) (Capper-Volstead Act bars claim that qualified cooperatives conspired in violation of Sherman Act section 1). This conclusion does not, however, dispose of plaintiff's principal argument—that the Capper-Volstead Act does not immunize from antitrust attack an organization that does nothing but fix prices.

We recognize RCMA's assertion that it performs more functions for its members than simply providing a vehicle for fixing prices, however, we decline to give any weight to this claim. Although it is apparent from the record that RCMA pools the funds its members receive from the production incentive differential and distributes them fairly among the member cooperatives, we cannot regard this as a separate service. Rather, it is little more than a component of RCMA's price fixing. Similarly, the

other activities RCMA points to, *see* Response of RCMA to Plaintiff's Interrogatories (As Amended)—Third Set at 25-43 (filed Oct. 25, 1977), are necessary, or at least ancillary, to RCMA's satisfactory performance of its price-fixing function. Moreover, whether RCMA does anything other than fix prices is immaterial in light of our rejection of plaintiff's principal argument.

We now turn to the principal issue the Count I motions raise—whether the Capper-Volstead Act immunizes from attack under section 1 of the Sherman Act an agricultural organization that does nothing but coordinate the price-fixing activities of its member cooperatives. We hold that it does.

Since the legislative history of the Capper-Volstead Act is somewhat ambiguous and lacking in examples, it gives little assistance to deciding what specific functions a qualified entity can safely perform. *See* FTC Bureau of Competition, A Report on Agricultural Cooperatives at 28-40 (1975) [hereinafter cited as FTC Staff Study]. It is clear, however, that Congress intended the bill to put farmers organizations on an equal footing with business corporations in antitrust cases. *Maryland and Virginia Milk Producers Association v. United States*, 362 U.S. 458, 466 (1960). Thus a cooperative may fix the prices its members charge just as a corporation fixes the prices of its goods; it need not fear that a court will view each farmer as an individual who, by joining the cooperative and agreeing to the price, conspired to restrain trade in violation of section 1 of the Sherman Act. *Id.* Congress hoped that allowing farmers to act collectively as cooperatives would enhance their bargaining power against large corporate middlemen and perhaps enable

the farmers to integrate vertically and take over the middlemen's functions. *See, e.g., National Broiler Marketing Association v. United States*, 436 U.S. 816, 824-28 (1978); *Central California Lettuce Producers Cooperative*, [1977] Trade Reg. Rep. (CCH) ¶21,337 at 21,235 (F.T.C.). But, since no ordinary business corporation exists simply to fix prices, this evidence of congressional intent provides no answer to whether the Act protects a cooperative that just fixes prices. "In summary, although price-setting was clearly a contemplated activity, the legislative history does not address the question whether or what kind of additional activity is required to qualify for the exemption." [1977] Trade Reg. Rep. (CCH) ¶21,337 at 21,236.

We have found only two decisions which address this question. Both the Federal Trade Commission (FTC) and the Northern District of California, in an opinion affirmed by the Ninth Circuit, have ruled that a combination which only fixes prices does not exceed the boundaries of the Capper-Volstead exemption. Both cases involved similar facts, because both arose from proceedings against the same entity, the Central California Lettuce Producers Cooperative (Central). Like RCMA, each of Central's twenty-two individual and corporate members held a seat on the board of directors and on the cooperative's executive committee. The committee met at least weekly to determine price policy which each member agreed to follow. Although Central advertised its own existence and at times of low sales engaged in some promotion of lettuce, generally each member handled its own lettuce and conducted its own sales program. Central also provided a conduit for the exchange of infor-

mation on lettuce production and on non-paying or complaining customers; however, "the primary activity of Central [was] to set prices or price ranges to which members [were] required to adhere in the sale of their lettuce." *Northern California Supermarkets, Inc. v. Central California Lettuce Producers Cooperative*, 413 F. Supp. 984, 987 (N.D. Cal. 1976), *aff'd*, 580 F.2d 369 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 873 (1979). The FTC found that it was "clear that the activities of Central and its members violate[d] Sec. 1 of the Sherman Act." *Central California Lettuce Producers Cooperative*, [1977] Trade Reg. Rep. (CCH) ¶21,337 at 21,234 (F.T.C.).

In both cases the question was whether Central qualified for the protections of the Capper-Volstead Act and section 6 of the Clayton Act even though its "marketing" activities appeared to be limited to price fixing alone. Both the FTC and Judge Orrick acknowledged that neither the legislature histories of the statues nor earlier cases had addressed this specific question; nevertheless, both ruled in favor of the cooperative.

Judge Orrick found support for his decision in *Maryland and Virginia Milk Producers Association v. United States*, 362 U.S. 458 (1960), in which Justice Black concluded from the legislative history that Congress intended the exemptions "to make it possible for farmer-producers to organize together, set association policy, fix prices at which their cooperative will sell their produce, and otherwise carry on like a business corporation without thereby violating the antitrust laws." *Id.* at 466. Since Justice Black stated that the activities set forth in section one of the Capper-Volstead Act were "among 'the legitimate objects' of farmer organizations,"

id., Judge Orrick concluded that "it is not necessary for a farmer association to engage in all of the enumerated activities to qualify for the exemption." 413 F. Supp. at 991.

The Ninth Circuit's opinion in *Treasure Valley Potato Bargaining Association v. Ore-Ida Foods, Inc.*, 497 F.2d 203 (9th Cir.), *cert. denied*, 419 U.S. 999 (1974), also pointed Judge Orrick to his conclusion. The two plaintiff cooperatives in *Treasure Valley* bargained in behalf of their members for standard contracts with potato processors. Each cooperative would negotiate with one of the two processors to which its members sold potatoes. The cooperatives agreed that each would then seek the same terms in its negotiations with the second processor. Although this activity appears far more substantial than what Central did for its members, Judge Orrick ruled that the Ninth Circuit's decision that the Capper-Volstead exemption protected the cooperatives from defendants' price-fixing counterclaim was "controlling" in Central's case. He looked primarily at the broad definition of "marketing" which the Ninth Circuit adopted: " 'The aggregate of functions involved in transferring title and in moving goods from producer to consumer, including *among others* buying, selling, storing, transporting, standarizing, financing, risk bearing, and *supplying market information.*' " 497 F.2d at 215 (quoting *Webster's New Collegiate Dictionary*, 1953 Edition) (emphasis added in Ninth Circuit opinion). Judge Orrick found:

> The aggregate of activities of Central constitute "collective marketing" within the meaning of the phrase as defined in *Treasure Valley*. Here, as in

> *Treasure Valley*, Central was "supplying market information and performing other acts . . . involved in the transferring of title" of the produce. But, even in *Treasure Valley*, the *principal* function of the cooperative was to set prices.

413 F. Supp. at 992 (emphasis in original) (citations omitted). He called the collective bargaining done by the *Treasure Valley* cooperatives but not by Central "a distinction without a difference." *Id.*

RCMA neither bargains collectively for its members nor supplies them with market information. And, we have stated above that RCMA's ancillary activities are of no consequence to our decision. We note, however, that RCMA acts as a clearinghouse for the equitable distribution of production incentive differential income among the seven members. Moreover, the members apparently exchange market information informally at their monthly price-setting meetings. *See* Affidavit of Arthur D. Little at 11, ¶40 (filed Sept. 5, 1978). These activities, together with RCMA's price-fixing seem comparable to what Judge Orrick found adequate to entitle Central to protection.

More significant than any comparison of activities, however, is Judge Orrick's dicta:

> Moreover, I am of the opinion that even if Central engaged in no other collective marketing activities, mere price-fixing is clearly within the ambit of the statutory protection. It would be ironic and anomalous to expose producers, who meet in a cooperative to set prices, to antitrust liability, know-

> ing full well that if the same producers engage in even more anticompetitive practices, such as collective marketing or bargaining, they would clearly be entitled to an exemption.

Id. He based this opinion on the legislative history, but also felt that: "Protection for price-fixing follows from the effect of Section 6 [of the Clayton Act] and Capper-Volstead in equating an agricultural cooperative and its members with an individual business entity since a single business enterprise may set for itself even wholly unreasonable prices without violating Section 1." *Id.* at 993 (citing *April v. National Cranberry Association*, 168 F. Supp. 919, 921-22 (D. Mass. 1958)). This reasoning and language give strong support to defendants' claims to summary judgment on Count I.

The FTC also found Central entitled to the Capper-Volstead exemption. It first ruled that a cooperative need not engage in all the activities specified in the statute, rather Congress had simply listed functions an agricultural cooperative "may" perform. The Commission then faced the question presented to Judge Orrick: Whether Central was engaged in "collective marketing."

The Commission found in the legislative history the congressional intent to allow farmers to organize into entities that would put them on a par with corporations but uncovered nothing to assist with the determination of whether Capper-Volstead protected an organization that did nothing but fix prices. *Central California Lettuce Producers Cooperative*, [1977] Trade Reg. Rep. (CCH) ¶21,337 at 21,236 (F.T.C.). Its examination of judicial interpretations of the statute began with *Treasure Valley*

and Judge Orrick's decision in *Northern California Supermarkets*. The Commission's opinion acknowledged that latter's view that price fixing alone was protected by the statute, but concluded simply: "Whatever 'marketing' activity excludes, it would surely seem to include establishing an asking price as an essential element of negotiations looking toward a sale." *Id.* at 21,237. It then turned to complaint counsel's argument that the statute protects only agricultural organizations that resemble corporations, but the Commission found that, "the principal cases relied on by complaint counsel readily accept intra-cooperative pricing agreements as a necessary incident of collective marketing. They do not establish a threshold for the cooperative's level of additional activity below which this conduct becomes illegitimate." *Id.* at 21,238.

The Commission's final conclusion rested on what it surmised Congress intended. It observed that Congress passed Capper-Volstead to confer on producer organizations the same advantages enjoyed by corporations, but that when it acted Congress believed that farmer incorporation was impossible. The Commissioner acknowledged that the explicit requirements of the statute should be strictly applied, nevertheless, it rejected the notion that farmers could obtain Capper-Volstead protection only by creating entities that resembled and peformed many of the same functions as a corporation. Thus an organization that meets the explicit statutory requirements and puts farmers in a position to bargain effectively with large buyers should be protected. How the farmers secure that position should, in the Commission's view, be largely irrelevant. "If, as in *Treasure Valley*, it

is sufficient merely for the cooperative to unite producers in 'collectively negotiating' over price, legal consequences should not attach if the cooperative presents the results of its decisions through each member rather than through a single agent representing each member." *Id.* at 21,239. Like Judge Orrick, the Commission found the statute applied to the lettuce growers' cooperative.

The reasoning of these cases is highly persuasive; we hold that section 1 of the Capper-Volstead Act exempts from the constraints of section 1 of the Sherman Act a qualified agricultural organization that does nothing but fix prices.

2. Count 2: Monopoly

Count II of the Amended Complaint alleges that defendants have violated section 2 of the Sherman Act, 15 U.S.C. §2, by monopolizing or attempting to monopolize the raw milk market from which plaintiff obtains its supply. Defendants contend that the Capper-Volstead Act protects them from a monopoly claim like Count II unless either of them has engaged in predatory practices. Since neither the Amended Complaint nor the discovery documents reveal actions which can be characterized as predatory, they argue they are entitled to judgment. We disagree with defendants' assertion that the Capper-Volstead Act adds to the elements of a monopoly claim when it is brought against a qualified cooperative; we deny their motions for summary judgment on Count II.

"The offense of monopoly under §2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth

or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). The Supreme Court has "defined monopoly power as 'the power to control prices or exclude competition.' The existence of such power ordinarily may be inferred from the predominant share of the market." *Id.* at 571 (quoting *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956)). The Sherman Act prohibition against attempts to monopolize is similar to the criminal law of attempt.

> Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against the dangerous probability as well as against the completed result.

Swift and Co. v. United States, 196 U.S. 375, 396 (1905) (citation omitted).

Defendants argue that the Capper-Volstead Act permits qualified cooperatives to acquire monopoly power by legal means unless they engage in predatory practices. They contend that the legislative history of, and the cases interpreting, the Capper-Volstead Act in the context of monopoly claims, require plaintiff to show the standard elements of a monopoly claim as well as at least one predatory act by one of defendants. The strongest

support in the legislative history for this assertion is the rejection by Congress of an amendment offered during consideration of the Capper-Volstead Act. When it reported the bill to the full Senate, the Senate Judiciary Committee proposed to strike the present section 2 and substitute:

> [n]othing herein contained shall be deemed to authorize the creation of, or attempt to create, a monopoly, or to exempt any association organized hereunder from any proceedings instituted under [the Federal Trade Commission Act].

As quoted in FTC Staff Study at 37. The Senate rejected the proposal.[3]

But, in the words of the FTC staff, "it would not be fair to conclude from the vote that the Senate wanted agricultural cooperatives to have monopoly power. Neither side in the debate relished the thought of agricultural cooperatives holding monopoly power and inflating consumer prices. The real issue was how monopoly cooperative associations should be controlled." FTC Staff Study at 38. After reviewing the entire legislative history, the FTC Staff concluded: "A fair distillation of Congressional sentiment as to cooperative size might then be: Cooperatives are free to attain the size necessary for efficient marketing and reduction of costs, but must not be allowed to inflate consumer prices through monopoly power." *Id.* at 40. In light of the general belief in Congress when the act was passed that the accumulation of monopoly power by agricultural cooperatives was highly unlikely, *id.*, we cannot agree with defendants claim that Congress intended Capper-

Volstead to give farmers greater freedom from the constraints of section 2 of the Sherman Act than corporations enjoy.

Defendants also rely on a series of cases in which courts have found agricultural cooperatives guilty of violating section 2 of the Sherman Act. Since all of these cases involved farmer organizations that had engaged in predatory practices, defendants argue that plaintiffs who sue qualified entities must show at least one act of this character in addition to proving the *Grinnel* elements. We have found no decision, however, in which plaintiff's case lacked evidence of predatory practices and suffered dismissal. We do not doubt that proof of predatory practices adds substantial weight to a plaintiff's monopoly claim, but we refuse to hold that it is a necessary element.

The case that begins the line defendants rely on is *Maryland and Virginia Milk Producers Association v. United States*, 362 U.S. 458 (1960). The defendant dairy association supplied about eighty-six per cent of the milk in the relevant market. In addition to showing this market power, the government alleged that the defendant had engaged in predatory practices to exclude, eliminate or attempt to eliminate competition from other individual producers or cooperatives.

> Supporting this charge the statement of particulars listed a number of instances in which the Association attempted to interfere with truck shipments of nonmembers' milk, and an attempt during 1939-1942 to induce a Washington dairy to switch its non-Association producers to the Baltimore market. The

> statement of particulars also included charges that the Association engaged in a boycott of a feed and farm supply store to compel its owner, who also owned an Alexandria dairy, to purchase milk from the Association, and that it compelled a dairy to buy its milk by using the leverage of that dairy's indebtedness to the Association.

Id. at 468. The Court ruled that the Capper-Volstead Act did not bar this Sherman Act section 2 claim. After acknowledging that Congress intended the Capper-Volstead Act to allow agricultural cooperatives to do things that corporations were already permitted, the Court stated that this purpose, "does not suggest a congressional desire to vest cooperatives with unrestricted power to restrain trade or to achieve monopoly by preying on independent producers, processors or dealers intent on carrying on their own businesses in their own legitimate way." *Id.* at 466-67. Moreover, the Court quoted parts of the legislative history including: "In the event that associations authorized by this bill shall do *anything* forbidden by the Sherman Antitrust Act, they will be subject to the penalties imposed by that law." *Id.* at 467 (quoting H. R. Rep. No. 24, 67th Cong., 1st Sess. 3) (emphasis added). And:

> The Solicitor of the Department of Argiculture testified that it was his "opinion that if the farmers want to create monopolies *or* want to engage in unfair practices in commerce, this bill certainly would not give them the right to do it, and they would have to get another bill.

Id. at 467 n.16 (quoting Hearings before a Subcommittee of the Senate Judiciary Committee on H. R. 2373, 67th Cong., 1st Sess. 203) (emphasis added). The facts did not require the Court to distinguish between a simple monopolization that violated section 2 and a monopolization promoted by predatory practices. The Court's language and the basis of its decision—that the Capper-Volstead Act provides agricultural cooperatives no greater freedom from the antitrust laws than corporations enjoy—support the inference that the Court would deny summary judgment to defendants here.

Subsequent lower court cases have also involved monopolies promoted or maintained by predatory practices. In *North Texas Producers Association v. Metzger Dairies, Inc.*, 348 F.2d 189 (5th Cir. 1965), *cert. denied*, 382 U.S. 977 (1966), the court affirmed a jury verdict that the defendant milk cooperative had violated section 2 of the Sherman Act.

> The complaint charged the Association with monopolizing and attempting to monopolize the marketing of raw milk in the Dallas-Fort Worth area by (a) control of the supply, (b) control of transportation, (c) refusal to transport milk for nonmembers of the Association, (d) boycott and coercion against Metzger, (e) covert attempt to purchase Metzger, (f) refusal to sell raw milk to Metzger unless Metzger stopped purchasing from Association's competitors, (g) purchase of other milk plants.

Id. at 191. The court's survey of the record showed there was evidence to support these allegations as well as the verdict. In dicta the court acknowledged that Capper-

Volstead allowed farmers to act together "without contravening the antitrust laws, but that otherwise, the association acts as an entity with the same responsibility under section 2 of the Sherman Act as if it were a private business corporation." *Id.* at 194. This language recognizes that a plaintiff claiming an agricultural cooperative has violated section 2 has no greater burden than if he sued a corporation.

The defendant milk cooperative in *Bergjans Farm Dairy Co. v. Sanitary Milk Producers*, 241 F. Supp. 476 (E.D. No. 1965), *aff'd*, 368 F.2d 679 (8th Cir. 1966), acquired the assets of a processor, engaged in predatory pricing and paid retail sellers secret rebates. In considering whether the cooperative violated section 2, the court pointed out that Capper-Volstead was intended to increase farmers' bargaining power, but the court applied the general rules of monopoly cases announced by Judge Learned Hand in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

> The exemption from the antitrust laws is designed to enable farmers, who had previously suffered from a lack of bargaining in the sale of their products, to form cooperatives in order to get better terms and prices for their produce. Therefore, defendant Sanitary's 55 to 60% control of raw milk in the St. Louis area was lawfully obtained. However, a lawfully-obtained power cannot be unlawfully used. Any use of monopoly power causes economic injury that the antitrust laws are designed to prevent. However, when a monopoly power, whether gained lawfully under the Capper-Volstead Act, under the patent laws, or by virtue of a natural monopoly, is

> used unlawfully, it gives rise to a violation of section 2 of the Sherman Act and amounts to unlawful monopolization, or attempt to monopolize.

241 F. Supp. at 483 (citation omitted). Concerning defendant's secret rebates, the court noted: "it is a predatory act *which shows evidence of* intent to monopolize under section 2 of the Sherman Act and constitutes part of a pattern of action aimed at monopolizing." *Id.* at 484 (emphasis added). The court recognized that the mere possession of monopoly power did not violate the antitrust laws, particularly in the case before it where the cooperative controlled only fifty-five to sixty per cent of the relevant market. But because the plaintiff had shown that defendant had specific intent to monopolize, it had established a section 2, attempt-to-monopolize violation.

There is language in the opinion which one might construe to mean that Capper-Volstead protects a cooperative that holds monopoly power and avoids predatory practices, but we think the better interpretation of the opinion as a whole is simply that a plaintiff can, with evidence of predatory practices, discharge its burden of showing intent to monopolize.

Defendants also rely on *Pacific Coast Agricultural Export Association v. Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976), and *Otto Milk Co. v. United Dairy Farmers Cooperative Association*, 388 F.2d 789 (3d Cir. 1967). Neither case supports their position. The Ninth Circuit in dicta did point out that the Capper-Volstead Act does not "immunize cooperatives engaged in competition-stifling practices from actions under the antimonopolization pro-

visions of the Sherman Act §2," 526 F.2d at 1202, but this hardly means that predatory practices are a necessary element to plaintiff's claim here. Moreover, the court recited the standard elements of a monopoly claim announced in *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966), when approving the trial court's jury instructions on that question. Even though the case involved monopolization of the distribution of fruit in Asia through an agreement with a non-exempt entity, not monopolization of production as in most agricultural cooperative cases, the court's application of *Grinnell* to an agricultural cooperative supports plaintiff's position here.

The only Sherman Act section 2 question before the *Otto Milk* court was whether plaintiffs had stated a sufficiently substantial claim under section 2 to support jurisdiction over a pendent state claim. The record showed that the cooperative had arranged picketing of grocery stores that sold plaintiff's milk, because the plaintiff purchased its raw milk from non-member producers. The court found substantial plaintiff's claim that the cooperative had attempted to monopolize based on "a deliberate, organized, determined maneuver to obtain a milk products monopoly in the particular market." 388 F.2d at 798. There is little in this case to comfort either party here.

The strongest statement supporting defendants' position appears in Judge Wyzanski's charge to the jury in *Cape Cod Food Prooucts, Inc. v. National Cranberry Association*, 119 F. Supp. 900 (D. Mass. 1954). Defendants make much of the statement that "it is not a violation of the Sherman Act or any other anti-trust act for a

Capper-Volstead cooperative to acquire a large, even a 100 per cent, position in a market if it does it solely through those steps which involve cooperative purchasing and cooperative selling." *Id.* at 907. But the context in which this assertion appears reveals that Judge Wyzanski meant only to point out that monopoly power alone was insufficient to show a violation of section 2. In fact, in the next paragraph he states:

> On the other hand, it would be a violation of the law, and it would be a prohibited monopolization for a person or group of persons to seek to secure a dominant share of the market through a restraint of trade which was prohibited, or through a predatory practice, *or through the bad faith use of otherwise legitimate devices.*

In *Shoenberg Farms, Inc. v. Denver Milk Producers, Inc.*, 231 F. Supp. 266 (D. Colo. 1964), the court made very clear that all Capper-Volstead does and all Judge Wyzanski intended was to shift the focus of antitrust analysis away from the individual members and onto the collective body as a single entity. In ruling that the cooperative alone could not be guilty of conspiracy that violated section 1 of the Sherman Act, the court stated:

> So far as the constituent producer-members of a Capper-Volstead cooperative are concerned, however, it appears probable, in the present state of the law, that the cooperative may lawfully acquire and exert significant market power—possibly even power conferred by monopoly status—so long as that power is acquired only by means of voluntary affiliation of producers with the cooperative. It is the cooperative, not its constituent members, which is the relevant entity.

Id. at 268. But, after an extended quote from Judge Wyzanski's charge, the court ruled that the cooperative alone could violate section 2.

> In the case of the §2 allegations made in the complaint the provisions of §2 must be dealt with separately. Section 2 embodies, first of all, a substantive prohibition, a prohibition which can be violated by a single business entity or any person acting on behalf of a business entity. . . .

Id. at 269.

Defendants have argued vigorously that the language of these cases indicates that courts should require plaintiffs to show that qualified cooperatives have engaged in predatory practices. Moreover, they assert that Congress intended Capper-Volstead to afford farmers the power to bargain effectively in the markets where they sell their produce; this statutory purpose would be frustrated, they claim, if courts imposed monopoly liability in the absence of predatory practices, because cooperatives fearing antitrust lawsuits would be reluctant to recruit a sufficient number of members to acquire the market power Congress intended them to have.

This fear may be real, but it does not justify affording cooperatives different treatment than corporations under section 2 of the Sherman Act. The legislative history of the Capper-Volstead Act as well as the cases that discuss it repeatedly demonstrate that Congress intended the Act to put farmers on an equal footing with the corporations they faced in the marketplace, not to give them an unfair advantage. Section 2 of the Sherman Act

was intended to prevent concentration of economic power and to promote competition. Judge Learned Hand has explained the importance of these ends:

> Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone. Such people believe that competitors, versed in the craft as no consumer can be, will be quick to detect opportunities for saving and new shifts in production, and be eager to profit by them.

United States v. Aluminum Co. of America, 148 F.2d 416, 427 (2d Cir. 1945). These considerations apply to agriculture and cooperatives no less than to industry and corporations; we decline to immunize agricultural cooperatives from competition. We hold that the Capper-Volstead Act does not require plaintiff to show that defendants have engaged in predatory practices; the elements of the claims plaintiff raises in Count II of its Amended Complaint are not changed because the defendants happen to be agricultural cooperatives.

3. Defendants' Supplemental Motions for Summary Judgment.

Defendants have filed supplemental motions for summary judgment which address plaintiff's claim for damages. To the extent that these motions are addressed to the price-fixing claim alleged in Count I of the Amended Complaint, we deny them as moot.

The sole indication that these motions are addressed to Count II appears in a footnote in defendant's memorandum which asserts:

> Fairdale's standing to claim monopolization in violation of Sherman Act §2 also is based upon Clayton Act §4, and the economic considerations of tenuous causation which apply to a claim of damage from purchases from competitors of a price-fixer in violation of Sherman §1 apply equally to a claim of damage from purchases from competitors of a monopolist in violation of Sherman §2. This is so because an analysis of proximate cause of a plaintiff's damage for violation of Sherman §1 or Sherman §2 each necessarily involves a determination of whether the defendants had sufficient market power to cause a competitor to raise its price following the lead of the price-fixers or monopolists. Consequently, the reasoning set forth in section I hereof, based upon the holding of the *Mid-West Paper* case, applies to exclude the damages in question whether the underlying alleged violation is grounded in section 1 or section 2 of the Sherman Act.

Memorandum of the Defendant Yankee Milk, Inc. in Support of Its Supplemental Motion for Summary Judgment Addressed to Plaintiff's Alleged Damages at 16 n.12 (filed July 11, 1979).

Defendants' reliance on *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979), to support its claim to summary judgment on Count II is misplaced. In *Mid-West Paper* the Third Circuit ruled

that a plaintiff who purchased bags from the competitors of alleged price fixers could not recover damages from the price fixers. The court relied primarily on *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), in which the Supreme Court held that indirect purchasers had no standing to sue price fixers. The Third Circuit pointed out that:

> *Illinois Brick* represents in effect the proposition that when defendants have fixed prices above the competitive market price, where the benefit derived by them is readily ascertainable, the objectives of the treble damage action are fulfilled when the defendants are required to pay the direct purchasers three times the overcharge. As explained in *Illinois Brick*, such an award not only deprives the violators of all the "fruits of their illegality" and deters further wrongdoing, it also compensates those victims who are most likely to assume the mantle of private attorneys general for the injuries they suffered.

Mid-West Paper, 596 F.2d at 585 (footnote omitted). Thus in price-fixing cases, the source and amount of defendants' wrongful benefits are significant factors in determining who may sue and how much they may recover. The court recognized, however:

> A different problem is presented where prices are fixed below the competitive market price or where defendants engage in other forms of anti-competitive conduct, such as group boycotts, vertical restrictions, or monopolization, since defendants' benefits in those instances are not so readily ascertainable,

> and may not be sufficient to compensate "those individuals whose protection is the primary purpose of the antitrust laws." In such circumstances courts have awarded damages based upon the amount of injury suffered by the plaintiff rather than the benefits derived by the defendants.

Id. at 585 n. 47. We think this difficulty in identifying the benefits of a monopoly is sufficient to distinguish price-fixing from monopoly claims in the context presented by defendants' motions.

Moreover, the elements plaintiff must show to establish a Sherman Act section two claim obviate at least part of the problem of complexity of the trial which troubled the *Mid-West Paper* court. "Apart from its speculative nature, any attempt to determine the effect of defendants' overcharges upon their competitors' prices would transform this antitrust litigation into the sort of complex economic proceeding that the *Illinois Brick* Court was desirous of avoiding if at all possible." *Id.* at 585. At the trial in this case, plaintiff must show defendants have monopoly power in the relevant market. This evidence would be the first step in showing that defendants' conduct caused prices to rise throughout the relevant market and damaged plaintiff. We do not mean to minimize the difficulty plaintiff faces in establishing the causal link between defendants' alleged monopoly and the damages the supplemental motions address, however, we do not find this difficulty will result in sufficient complexity to justify summary judgment.

Defendants also contend that we should limit to forty-five days the time period for which plaintiff can recover

damages caused by defendants' alleged termination of plaintiff's milk supply. We find no merit to this part of defendants' supplemental motion. *Lee-Moore Oil Co. v. Union Oil Co.*, 599 F.2d 1299, 1302 (4th Cir. 1979).

We deny defendants' supplemental motions for summary judgment.

4. Plaintiff's Motion for Summary Judgment on Defendant Yankee Milk's First Counterclaim.

Defendant Yankee Milk's first counterclaim seeks to recover damages from the plaintiff for alleged violations of the Agricultural Fair Practices Act of 1967 (AFPA), 7 U.S.C. §§2301-2306. Plaintiff has moved for summary judgment on the counterclaim on the ground that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. In the memorandum in support of its motion, Fairdale first attacks the standing of Yankee to assert a claim under the AFPA and second, asserts that if Yankee does have standing, Yankee has not alleged facts that would support an AFPA cause of action.

A. *Standing*

The AFPA makes it unlawful for any handler knowingly to engage or permit any employee or agent to engage in certain prohibited practices enumerated therein.[4] Plaintiff is a "handler" by definition under the act. 7 U.S.C. §2302(a). The AFPA provides that any "person" injured in his business or property by reason of any violation, or combination or conspiracy to violate the provisions of the act by engaging in the forbidden practices may sue and recover damages therefor in an appropriate

district court without respect to the amount in controversy. 7 U.S.C. §2305(c). The term "person" includes individuals, partnerships, corporations and associations. 7 U.S.C. §2302(d).

Despite the rather clear language of the statute which seemingly permits Yankee to maintain its counterclaim plaintiff contends that defendant lacks the necessary standing to do so. The standing of a party to prosecute an action is determined by means of a two-part test as found in *Sierra Club v. Morton*, 405 U.S. 727 (1972) and *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). That test provides that a plaintiff must suffer an "injury in fact" and that such injury must be " 'arguably within the zone of interests to be protected or regulated' by the statutes" that are claimed to be violated. *Sierra Club*, 405 U.S. at 773. Plaintiff argues that Yankee meets neither part of the test and Yankee asserts the contrary.

Plaintiff relies on the legislative history of the AFPA to support its claim that the act was only intended to provide a remedy for individual producers against handlers who violate the act and not to provide a collective remedy for a cooperative association of dairy farmers such as Yankee. In view of its interpretation of the intent of the act, Fairdale asserts that Yankee is without standing to pursue its first counterclaim. Fairdale points to various remarks of Congressmen at the time the act was being considered for passage[5] as well as *Butz v. Lawson Milk Co.*, 386 F. Supp. 227 (N.D. Ohio 1974) in which the Ohio district court stated after a

review of the legislative history that "the overriding purpose of Congress in enacting the Agricultural Fair Practices Act of 1967 was to protect the individual producer of milk in his right . . ., in effect, to unionize." *Id.* at 235.

Yankee states that it enjoys no existence separate from its members for the purpose of determining injury and that an allegation of injury to Yankee necessarily sets forth injury to its individual members. It finds support for this argument in the statement in *Sierra Club* that an "organization whose members are injured may represent those members in a proceeding for judicial review," 405 U.S. at 739, whereas an association which alleges injury to an abstract public interest may not.

We hold that Yankee has standing to maintain its counterclaim. We agree with *Butz* that the principal purpose of the AFPA was to permit producers to "unionize" by forming or joining cooperatives free from coercion, intimidation and other impermissible practices by handlers. We see no reason why the cooperative may not bring an action under the AFPA on behalf of its members alleged to have been collectively injured by activities prohibited by the act. The language of the act specifically includes among those who may sue for a violation of its provisions association as well as individuals and other business entities. We are satisfied that the words of the statute should be given their plain meaning, *United States v. Cooper*, 580 F.2d 259, 261 (7th Cir. 1978) (" 'when words are free from doubt they must be taken as the final expression of the legislative intent' " (citation omitted)); *Sheehan v. Scott*, 520 F.2d 825, 829 (7th

Cir. 1975) ("[w]ords in statutes must be given their common ordinary meanings.") See *Yates v. United States*, 354 U.S. 298, 305 (1957); *Gemsco, Inc. v. Walling*, 324 U.S. 244, 260 (1945); *United States v. Goldenberg*, 168 U.S. 95, 103 (1897). Yankee possesses the standing necessary to pursue its counterclaim.

B. *Genuine Issue of Material Fact*

We still must determine whether there is a genuine issue of material fact precluding judgment for Fairdale on the counterclaim as a matter of law.

> [O]n a motion for summary judgment the court cannot try issues of fact; it can only determine whether there are issues to be tried [citations omitted]. Moreover, when the court considers a motion for summary judgment, it must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought, *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed.2d 176 (1962), with the burden on the moving party to demonstrate the absence of any material factual issue genuinely in dispute, *Adickes v. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 26 L. Ed.2d 142 (1970). This rule is clearly appropriate, given the nature of summary judgment. This procedural weapon is a drastic device since its prophylactic function, when exercised, cuts off a party's right to present his case to the jury. *Donnelly v. Guion*, 467 F.2d 290, 291 (2d Cir. 1972).

Heyman v. Commerce and Industry Insurance Co., 524 F.2d 1317, 1319-20 (2d Cir. 1975). *See First National Bank of Cincinnati v. Pepper*, 454 F.2d 626, 629 (2d Cir. 1972).

To determine whether Fairdale is entitled to judgment in its favor in light of the foregoing requirements, we examined the depositions and other documents filed in this cause and counsel's interpretations thereof as well as the other arguments that the parties have urged upon us.

The counterclaim itself merely states that Yankee "has reasonable grounds to believe that plaintiff did engage or permit its employees to engage in practices prohibited by §4 of the above-mentioned [Agricultural Fair Practices] Act, 7 U.S.C. §2303" followed by a verbatim recitation of the prohibited practices as stated in section 2303. Plaintiff contends that these vague allegations are insufficient to state a claim for violation of the AFPA. Yankee counters that its allegations are made sufficiently definite by its Answers to Certain Interrogatories of Fairdale, most notably number 57 of Plaintiff's Interrogatories addressed to the Defendant Yankee Milk, Inc.—Second Set, as well as Response 15 of Plaintiff's Response to Yankee's First Set of Interrogatories, certain deposition testimony referred to in Yankee's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment (filed October 2, 1978) and letter of Yankee's counsel to the court dated September 28, 1979 (filed October 2, 1979). Fairdale in a letter from its counsel to the court dated October 10, 1979[6] (filed October 22, 1979) in response to Yankee's letter states that Yankee has still presented no "issue in fact" for the

court's determination. It buttresses this assertion by certain exhibits attached to its letter including a newly filed affidavit of Robert T. Holden, president of plaintiff, dated October 10, 1979.

The gist of Yankee's counterclaim centers upon the activities of Fairdale immediately preceding and following the severance of its relationship with Yankee in late 1974. But Yankee is able to point to only one specific instance of Fairdale's alleged improper conduct. Such conduct involves a meeting arranged by Fairdale on December 19, 1974, with various producers, including certain Yankee members, at which Fairdale distributed a comparative price list which purported to set forth the prices for all alternative markets to which the producers attending could ship their milk. This list omitted the Connecticut price which was also available to the producers and which was higher than the price Fairdale was then paying. Fairdale acknowledges that the Connecticut price was not on the list given out at the meeting but refers to deposition testimony of Fairdale officials that the omission was unintentional because they were unaware that there were producers in their market area who were receiving the Connecticut price.

Eventually three of eleven Yankee producers' returned to Fairdale but only after they were free to do so. Two of these producers returned only after their contracts with Yankee were properly terminated according to their terms. This was after they attended another meeting with Fairdale in January, 1975, at which Fairdale handed out a price comparison that included the Connecticut

price. Fairdale also started to pay the Connecticut price to all of its producers prior to the time the Yankee producers returned to it.

Regardless of whether the omission of the Connecticut price on the December 19, 1974, handout was inadvertent or intentional, Fairdale asserts it did not violate any provisions of the AFPA. Based on the analysis contained in the October 10, 1979, letter from Fairdale's counsel, p. 2, we agree. Whether or not plaintiff's failure to inform can be considered a significant act of deception it simply does not rise to the level of "coercion" or "refusal to deal", 7 U.S.C. §2303(a), "discrimination", *id.* §2303(b), or "intimidation", *id.* §2303(c), against which the AFPA is designed to guard. Nor does it fit within the proscription of the remaining provisions of 7 U.S.C. §2303. Such conduct does not offer an inducement or reward to a producer for ceasing to belong to an association of producers, *id.* §2303(d), nor is it the making of a false report about the finances, management or activities of associations of producers or handlers, *id.* §2303(f).

In their letter of September 28, 1979, counsel for Yankee described four events between December 12, 1974, and January 15, 1975, which Yankee contends "creates a strong inference that Fairdale's acts, including the intentional omission [of the Connecticut federal order price], were calculated to induce the Yankee members supplying Fairdale to terminate the memberships with Yankee and continue as Fairdale suppliers." There is nothing improper, however, in a handler's dealing directly with a producer even though the producer is a member of an association, *Butz*, 386 F. Supp. at 237, provided

the handler does not act in a manner prohibited by the AFPA. The cumulative effect of the additional meetings and the fact that Yankee was not invited to participate simply does not bring Fairdale's conduct within the ambit of activities prohibited by the AFPA. We also do not believe that Yankee's conclusory and general answers to number 57 of plaintiff's second set of interrogatories adequately present a genuine issue of material fact respecting a violation of the AFPA. This is particularly so in light of the October 10, 1979, affidavit of Fairdale's president, Robert T. Holden, which expressly refutes Yankee's claim of impermissible conduct by Fairdale in those areas described by Yankee's answer to interrogatory number 57.

Yankee argues that its effort to explore further factual bases for its counterclaim has been impeded by Fairdale's failure to comply fully with discovery requests and that such failure deprives Fairdale of the right to summary judgment. Fairdale replies that it has fully responded to Yankee's discovery requests and Yankee's "failure to come up with facts evidencing a violation is solely because such facts do not exist, not because plaintiff has failed to respond to discovery requests." Whether or not Fairdale has responded to Yankee's various interrogatories and requests for production as fully as Yankee would like, we are persuaded that Fairdale has responded adequately and we cannot accept Yankee's argument that its inability to be more definite with respect to the underlying factual basis for its counterclaim results from Fairdale's inadequate responses.

Nothing in the documents that have been called to our attention demonstrates a factual question concerning a violation of the AFPA by Fairdale and Fairdale has sufficiently demonstrated that there is none. We are satisfied that Fairdale has met its burden of persuasion on the summary judgment motion. We recognize that Yankee, as the non-moving party has no burden to establish that there is such an issue for resolution on trial and, of course, all ambiguities must be resolved and reasonable inferences must be drawn in its favor. Nevertheless, the parties have engaged in extensive and intensive discovery proceedings since the outset of this matter and there has been ample time and effort expended by each for Yankee to have developed at least some evidentiary support for its first counterclaim if there were any.

We do not deem it sufficient for Yankee to simply rely on a claimed failure of Fairdale to respond to discovery. It has some obligation to point out to the court with at least a minimal degree of specificity those facts in dispute that would make summary judgment inappropriate. For instance, there are sources other than Fairdale, such as the producers involved in the transaction, whether they left or stayed with Yankee, who would presumably be cognizant of AFPA violations if they were any. We can, without shifting the burden of proof, consider Yankee's failure to refer to sources other than Fairdale as having a bearing on the issue before us, especially given the length of time the action has been pending and the extensive discovery efforts in which the parties have engaged over a four year period.

Since we consider Fairdale has met its burden and we can ascertain no factual issues to be resolved at trial and none have been called to our attention with respect to Fairdale's alleged violation of the AFPA, we grant plaintiff's summary judgment motion to Yankee's first counterclaim.

28 U.S.C. §1292(b)

We find that our decisions on both counts of plaintiff's Amended Complaint and Yankee's first counterclaim involve controlling questions of law as to which there are substantial ground for difference of opinion. Since reversal of our decision on Count I would render meaningless the four to six week trial which counsel anticipate, and since reversal of our denial of summary judgment on Count II would preclude such a trial, an immediate appeal from the order would materially advance the ultimate termination of the litigation. We note that this case is the kind of " 'protracted and expensive litigation, as in antitrust and similar protracted cases,' " *Medomsley Steam Shipping Co. v. Elizabeth River Terminals, Inc.*, 317 F.2d 741, 743 (4th Cir. 1963) (quoting 1958) U.S. Code Cong. & Ad. News at 5260-61), which Congress intended the 28 U.S.C. §1292(b) procedure to expedite if either or both of the parties elect to take advantage of it.

Conclusion

We deny plaintiff's motion for summary judgment on Count I of its complaint and grant its motion for summary judgment on defendant Yankee's first counterclaim. We grant defendants' motions for summary judgment on Count I and deny their motions on Count II; we also deny defendants' supplemental motions for summary judgment.

Dated at Burlington in the District of Vermont, this 1st day of November, 1979.

ALBERT W. COFFRIN
District Judge

First Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1128, 1412, 1413—September Term, 1979

(Argued June 16, 1980 Decided December 9, 1980)

Docket Nos. 80-7028, 7034, 7036

FAIRDALE FARMS, INC.,

Plaintiff-Appellant-Cross-Appellee,

—v.—

YANKEE MILK, INC. and REGIONAL COOPERATIVE MARKETING AGENCY, INC.,

Defendants-Appellees-Cross-Appellants.

Before:

VAN GRAAFEILAND and KEARSE, *Circuit Judges,* and NICKERSON, *District Judge.* *

Appeal from an order of the United States District Court for the District of Vermont, Coffrin, *J.*, granting

* Of the Eastern District of New York, sitting by designation.

summary judgment to defendants on plaintiff's cause of action under section 1 of the Sherman Act, 15 U.S.C. § 1, and denying summary judgment to the defendant on plaintiff's cause of action under section 2 of the Act, 15 U.S.C. § 2. That part of the order granting summary judgment is affirmed. That part of the order denying summary judgment is vacated, and the matter is remanded to the district court for further consideration.

FRED I. PARKER, Middlebury, Vt. (Langrock, Sperry, Parker & Stahl, Middlebury, Vt., Susan Humphrey, and Chapman & Clearwaters, Washington, D.C., Keith I. Clearwaters and Dudley H. Chapman, on the brief), *for Plaintiff-Appellant-Cross-Appellee.*

DAVID P. O'HARA, Syracuse, N.Y. (Bond, Schoeneck & King, Syracuse, N.Y., John M. Freyer and David R. Sheridan, on the brief), *for Defendant-Appellee-Cross-Appellant Regional Cooperative Marketing Agency, Inc.*

ANDREA LIMMER, Washington, D.C. (Attorney, Department of Justice, Washington, D.C., Sanford M. Litvack, Assistant Attorney General, and Barry Grossman, on the brief), *for United States of America as amicus curiae.*

FREDERICK U. CONARD, JR., Hartford, Ct. (Shipman & Goodwin, Hartford, Ct., H. Martyn Owen, Theodore M. Space,

Thomas D. Clifford and Peter W. Benner, on the brief), *for Defendant-Appellee-Cross-Appellant Yankee Milk, Inc.*

VAN GRAAFEILAND, *Circuit Judge:*

This is a certified appeal under 28 U.S.C. § 1292(b) from a decision and order of Judge Coffrin of the United States District Court for the District of Vermont. Plaintiff Fairdale Farms, Inc. appeals from the summary dismissal of its claim under section 1 of the Sherman Act, 15 U.S.C. § 1, that defendants Yankee Milk, Inc. and Regional Cooperative Marketing Agency, Inc. (RCMA) illegally fixed raw milk prices. Yankee and RCMA appeal from the denial of their summary judgment motions to dismiss plaintiff's claim that defendants monopolized and attempted to monopolize trade in raw milk in violation of section 2 of the Sherman Act, 15 U.S.C. § 2.

We affirm that part of the order granting defendants summary judgment on the section 1 claim. We vacate that portion of the order dealing with the section 2 claim and remand to the district court for further proceedings consistent with this opinion.

Plaintiff Fairdale is both a producer and dealer-processor of milk. It is located near Bennington, Vermont and buys and sells in the Vermont, New York, and Massachusetts area. Yankee is a milk producers cooperative with a membership of approximately 6,000 New England farmers. In 1973 minimum dairy prices for the northeastern United States, set by the government under the Agricultural Marketing Agreements Act of 1937, 7 U.S.C. § 608c(5), were not providing an adequate return

to the farmers. In order to secure prices with which their members could live, Yankee and six other area cooperatives organized RCMA as an agricultural cooperative marketing corporation, whose primary function was to establish prices for the member farmers' milk. Between 1973 and 1975, these prices were usually higher than the federal order prices. Since August 1975, RCMA has not established an over-order price.

Until 1974, Fairdale bought a large portion of its milk from Yankee members. However, in 1974 Fairdale objected to paying the over-order price and, when negotiations with defendants proved fruitless, discontinued its purchases from Yankee farmers. In 1976, Fairdale brought this suit charging defendants with price fixing, monopolizing, and attempting to monopolize. Defendants alleged as an affirmative defense that the Capper-Volstead Act, 7 U.S.C. §§ 291-292, protected them against liability for the conduct of which Fairdale complained.[1] The adequacy of this defense is the issue on appeal.

The Section 1 Count

Price fixing arrangements are generally held to be *per se* violations of section 1 of the Sherman Act. *White Motor Co. v. United States*, 372 U.S. 253, 260 (1963). The Capper-Volstead Act provides, however, that farmers may act together in associations in collectively marketing their goods, and the associations may make

---

1 Defendants also asserted a counterclaim against Fairdale for alleged violation of the Agricultural Fair Practices Act of 1967, 7 U.S.C. §§ 2301-2306. The district court's dismissal of this counterclaim is not being considered on this appeal.

the necessary contracts to effect this purpose.[2] Fairdale does not contest Yankee's right under the Act to fix the prices its members charge. Confronted with Justice Black's opinion in *Maryland and Virginia Milk Producers Association v. United States*, 362 U.S. 458 (1960), Fairdale does not have much choice. Examining the legislative history of Capper-Volstead, Justice Black found that Congress intended to permit farmers to organize together to "fix prices at which their cooperative will sell their produce." *Id.* at 466.

Fairdale contends, however, that RCMA does not have the same price-fixing right as does Yankee, and advances two arguments in support of its contention. It asserts first that Capper-Volstead gives only single cooperatives, not associations of cooperatives, the right to fix prices. Second, it contends that a cooperative association organized for the sole purpose of fixing prices is not entitled to Capper-Volstead protection. The district

---

2 The pertinent provisions of the Capper-Volstead Act read:

> Persons engaged in the production of agricultural products . . . may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes. . . .

7 U.S.C. § 291.

Capper-Volstead was an enlargement of section 6 of the Clayton Act, 15 U.S.C. § 17, which provided:

> Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of . . . agricultural . . . organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

court rejected both contentions for reasons with which we agree.

The Capper-Volstead Act permits the formation of "associations" which may perform marketing functions and which may have "marketing agencies in common." The district court concluded that RCMA was one or the other of these organizations and that "grave legal consequences" should not be visited upon it as the result of a *de minimis* organizational distinction. *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29 (1962). *See Treasure Valley Potato Bargaining Association v. Ore-Ida Foods, Inc.*, 497 F.2d 203, 213-17 (9th Cir.), *cert. denied*, 419 U.S. 999 (1974). Fairdale's first argument is based upon a misreading of the Act and was properly rejected by the district court.

Fairdale's second argument is predicated upon a hyper-technical reading of the statute. Capper-Volstead provides that farmers may act together in associations in collectively "processing, preparing for market, handling, and marketing" their products. Fairdale contends that RCMA must do more than just fix prices in order to get the benefit of this statute. In the only two prior proceedings in which this argument was made, it was rejected. *Northern California Supermarkets, Inc. v. Central California Lettuce Producers Cooperative*, 413 F. Supp. 984, 992 (N.D. Cal. 1976), *aff'd*, 580 F.2d 369 (9th Cir. 1978) (per curiam), *cert. denied*, 99 S. Ct. 873 (1979); *Central California Lettuce Producers Cooperative*, [1977] Trade Reg. Rep. (CCH) ¶ 21,337 (FTC). The establishment of price is an integral part of marketing. *Id.* at 21,237. It would be strange indeed if participation in this portion of the marketing process, standing alone, would subject a cooperative to antitrust liability, when the exercise of the full range of activities covered by

Capper-Volstead would not. *Northern California Supermarkets, Inc. v. Central California Lettuce Producers Cooperative, supra*, 413 F. Supp. at 992.

We agree with the district court that Fairdale had no section 1 claim against the defendants. The district court did not err in granting the defendants' motion for summary judgment on this claim.

The Section 2 Count

Section 2 of the Sherman Act makes it unlawful for any person to monopolize, attempt to monopolize, or conspire with another to monopolize, trade. There is an inherent conflict between this provision and those of Capper-Volstead which legitimize the collective action of farmers in the marketing of their products. By exempting farmers from Sherman Act limitations on the ability to combine into cooperatives, Capper-Volstead gives farmers the right to combine into cooperative monopolies. The Act places no limits on combination; it does not forbid farmers from combining after their cooperative reaches a certain size. For a court to impose such limits and hold cooperatives liable for treble damages if they run afoul of a judicial standard would discourage the growth of these cooperatives. The Capper-Volstead Act recognizes that farmer cooperatives may grow into monopolies and includes precautions to prevent abuse of monopoly power. Section 2 of the Act, 7 U.S.C. § 292, permits the Secretary of Agriculture to order a cooperative to cease and desist if it monopolizes or restrains trade "*to such an extent* that the price of any agricultural product is *unduly enhanced* by reason thereof. . . ." (emphasis added).

The district judge "[disagreed] with defendants' assertion that the Capper-Volstead Act adds to the elements of a monopoly claim when it is brought against a qualified cooperative," and stated that "a plaintiff claiming an agricultural cooperative has violated section 2 has no greater burden than if he sued a corporation." Disregarding the fundamental differences between a cooperative and a corporation, the district judge subscribed to the corporate monopolization test of *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966), which proscribes the willful acquisition of monopoly power that is not the result of "a superior product, business acumen, or historic accident." We believe that the district court misconstrued the congressional intent evidenced in Capper-Volstead.

Although agricultural cooperatives have existed in the United States since the early 1800's, until the twentieth century they were mostly small local organizations with little power to bargain effectively on behalf of their members. Moreover, their growth was inhibited by both state and federal antitrust laws. *Maryland and Virginia Milk Producers Association v. United States, supra,* 362 U.S. at 464. *See generally* Note, *Trust Busting Down on the Farm: Narrowing the Scope of Antitrust Exemptions for Agricultural Cooperatives,* 61 Va. L. Rev. 341 (1975). When the Sherman Act was under consideration in 1890, an amendment was proposed that would have exempted agricultural cooperatives from the proscriptions of the Act. Although Senator Sherman did not believe that his bill applied to farmers' associations, he apparently was willing to accept the amendment. However, without explanation, it was deleted from the bill as enacted. *See* 1 Kintner, *Federal Antitrust Law* §§ 4.8, 4.9, 4.12 (1980). Whatever the reason for deletion, the

Sherman Act, as interpreted by the Supreme Court, *see Loewe v. Lawlor*, 208 U.S. 274, 301 (1908), was a strong deterrent to the development of large agricultural cooperatives.

The tremendous growth of the California fruit industry brought about a drastic change in the merchandising of farm commodities. When California growers discovered the advantages of collectively processing and marketing their perishable fruit, large-scale, single commodity cooperatives quickly assumed a dominant role in the industry. *See, e.g., Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., supra*, 370 U.S. at 28-29. Shortly after World War I, the concept of large-scale, cooperative commodity marketing began to spread to other parts of the country. Wheat, cotton, and tobacco growers, in particular, became involved in the regional commodity cooperative movement. Knapp, *The Advance of American Cooperative Enterprise* 7-12 (1973). *See Liberty Warehouse Co. v. Burley Tobacco Growers' Co-Operative Marketing Association*, 276 U.S. 71 (1928). Legislatures in many states enacted enabling statutes excepting organizations of this type from the coverage of state antitrust laws. *Tigner v. Texas*, 310 U.S. 141, 145-47 (1940). The American Cotton Association was organized in 1919, and in 1920 a plan for the organization of state marketing cooperatives was adopted. An essential element of this plan, and one of the " '8' commandments of 'commodity cooperative marketing' ", was that each cooperative should "control a sufficient proportion of the entire crop to be a dominant factor in the market. . . ." Knapp, *supra*, at 9.

Congress was not unaware of what was taking place. Senator Walsh, the most vociferous opponent of Capper-Volstead's anti-Sherman features, directed the attention

of his colleagues specifically to the fact that 93 per cent of California's raisin growers were members of the Sun Maid Raisin Growers Association. *See* 62 Cong. Rec. 2164 (1922). Senator Capper pointed to the 1,100 member California Fruit Growers Exchange as the "type of cooperative that would find 'definite legalization' " under Capper-Volstead. *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., supra,* 370 U.S. at 28. Clearly, cooperatives "of such size and general activities" were contemplated by the proposed Act. *Id.* at 29. Proponents of Capper-Volstead, the prototype of which was introduced in 1919, *see* H.R. 7783 and S. 845, 66th Cong., 1st Sess. (1919), were convinced that farmers needed congressional help and, if there was any doubt on this score, it was dispelled by the severe agricultural depression of 1920.

In the presidential election of 1920, both party platforms stressed the need for legislative protection of the cooperative movement. In 1921, Congress organized a Joint Commission of Agricultural Inquiry to investigate, among other things, the causes of the agricultural depression and the reason for the difference between the prices paid farmers and costs to consumers. Among the Commission's recommendations was the enactment of legislation to strengthen the legal position of cooperatives. Knapp, *supra,* at 21.

A national Agricultural Conference was convened by the Secretary of Agriculture in January 1922, at which President Harding spoke. He assured the conferees that they would be afforded "ample provision of law under which they [might] carry on in cooperative fashion those business operations which lend themselves to that method. . . ." *Id.* at 23. The Conference's Committee on the Marketing of Farm Products recommended "the

formation of strongly organized cooperative associations of farmers, preferably on a commodity basis." *Id.* at 24.

It is little wonder, then, that Capper-Volstead and the major pieces of farm legislation that followed it strongly supported the cooperative movement. In Capper-Volstead, Congress did not simply broaden the scope of section 6 of the Clayton Act, 15 U.S.C. § 17, so as to bring cooperatives issuing capital stock within that section's antitrust exemptions. Where section 6 spoke only in terms of cooperative purposes, *i.e.*, "mutual help", Capper-Volstead spelled out the broad range of activities in which the cooperative might engage, *i.e.*, "processing, preparing for market, handling, and marketing." *See National Broiler Marketing Assn. v. United States*, 436 U.S. 816, 824-25 (1978).

In the Cooperative Marketing Act of 1926, 44 Stat. 802 (1926) (current version at 7 U.S.C. §§ 451-457), Congress authorized the Secretary of Agriculture to establish a division of cooperative marketing. 44 Stat. 802. That division was to render services to agricultural cooperatives, to confer and advise with producers desirous of forming cooperatives, and to promote the knowledge of cooperative principles. *Id.* at 802. Cooperative associations were also authorized to exchange and disseminate market and economic information among themselves. *Id.* at 803.

The declared policy of the Agricultural Marketing Act of 1929, 46 Stat. 11 (1929) (current version at 12 U.S.C. §§ 1141-1141j), was to promote the effective merchandising of agricultural commodities "so that the industry of agriculture [would] be placed on a basis of economic equality with other industries. . . ." 46 Stat. 11. This would be accomplished in part "by encouraging the organization of producers into effective associations or

corporations under their own control for greater unity of effort in marketing and by promoting the establishment and financing of a farm marketing system of producer-owned and producer-controlled cooperative associations and other agencies." *Id.* The Federal Farm Board, created by the Act, was authorized to make loans to cooperatives to assist them in "extending" their membership by educating producers in the advantages of cooperative marketing. *Id.* at 14. If, in the judgment of the Board, the producers of any commodity were "not organized into cooperative associations representative of the commodity", the Board was authorized to make the benefits of the Act available to other cooperatives dealing in the same commodity. *Id.* at 18.[3]

The Farm Credit Act of 1933, 48 Stat. 257 (1933), authorized the creation of twelve "Banks for Cooperatives", which were authorized to make loans to cooperative associations for most of the purposes set forth in the Agricultural Marketing Act. 48 Stat. 257. Specifically included within these purposes was the "effective merchandising of agricultural commodities." *Id.* at 265.

As late as 1968, with the enactment of the Agricultural Fair Practices Act, Pub. L. No. 90-288, 82 Stat. 93 (1968) (current version at 7 U.S.C. §§ 2301-2306), Congress continued to recognize the need for stronger and more effective marketing and bargaining associations of farmers. *See* [1968] U. S. Code Cong. & Ad. News 1869. Congress declared that the "marketing and bargaining position of individual farmers will be ad-

---

[3] The first chairman of the Farm Board promptly declared that "[t]he Board believes that it can be of great assistance to American farmers by encouraging the development of large-scale, central cooperative organizations." Knapp, *supra*, at 123.

versely affected unless they are free to join together voluntarily in cooperative organizations as authorized by law", 82 Stat. 93, and forbade any coercive practices by handlers which would interfere with the farmers' exercise of this right. *Id.* at 94. *See Butz v. Lawson Milk Co.*, 386 F. Supp. 227, 235 (N.D. Ohio 1974).[4]

It is apparent from these statutes that agricultural cooperatives were "a favorite child of Congressional policy." 5 Toulmin, *Antitrust Laws* § 6.1, at 334 (1950); *Stark v. Brannan*, 82 F. Supp. 614, 617 (D.D.C. 1949). "Moreover, there is persuasive evidence that Congress'

---

[4] *See also*

a) the Agricultural Adjustment Act of 1933, § 8(2), 48 Stat. 34 (1933) (current version at 7 U.S.C. §§ 601-604, 607-623), which empowered the Secretary of Agriculture to enter into marketing agreements with associations of producers, such agreements not to be held in violation of the antitrust laws;

b) the Agricultural Adjustment Act of 1935, § 16(b)(1), 49 Stat. 767 (1935), requiring the Secretary of Agriculture to accord such recognition and encouragement to producer-owned and producer-controlled cooperatives as would be in harmony with the policy toward such cooperatives already set by Congress, *see United States v. Rock Royal Co-Operative, Inc.*, 307 U.S. 533, 562-64 (1939);

c) the Robinson-Patman Anti-Discrimination Act, § 4, 49 Stat. 1528 (1936) (current version at 15 U.S.C. §§ 13, 13a, 13b, 21a), which permitted cooperatives to return net earnings and surplus to their members, producers and consumers in proportion to their purchases or sales;

d) the Motor Carrier Act, 1935, § 203(b), 49 Stat. 545 (1935), which exempted motor vehicles controlled and operated by cooperative associations from most of the Act's provisions;

e) the 1939 Internal Revenue Code, § 101(12)(A), 53 Stat. 33-34 (1939) (current version at 26 U.S.C. § 521), which exempted certain farmers cooperatives from taxation;

f) the Investment Company Amendments Act of 1970, § 27(c), 84 Stat. 1435 (1970), which exempted certain farmers cooperatives from the registration requirements of the Act;

g) the National Agricultural Marketing and Bargaining Act of 1971, 9 Harv. J. Leg. 498 (1972) (proposed but not enacted).

concern for protecting contract growers vis-a-vis processors and handlers has not abated." *National Broiler Marketing Assn. v. United States, supra,* 436 U.S. at 837. (Brennan, *J.*, concurring). The consistent tenor of the enactments shows that Congress wanted and expected farmers to be represented by strong and effective cooperatives, so extensively organized as to be representative of individual commodities. Unity of effort was encouraged in order to give farmers the same "unified competitive advantage" available to businessmen acting through corporations. *Maryland and Virginia Milk Producers Association v. United States, supra,* 362 U.S. at 466. As Senator Capper himself expressed it, when he successfully opposed Senator Walsh's proposed amendment to Capper-Volstead that would have prohibited the creation of cooperative monopolies, *see* S. Rep. No. 236, 67th Cong., 1st Sess. (1921), "no association can efficiently operate that does not control and handle a substantial part of a given commodity in the locality where it operates." 62 Cong. Rec. 2058 (1922).

In short, when Congress enacted the Capper-Volstead Act, it did not intend to prohibit the voluntary and natural growth that agricultural cooperatives needed to accomplish their assigned purpose of effective farmer representation. That farmers' legitimate desires for unity of effort would incorporate of necessity a concept of corporate aggrandizement did not *per se* make this method of cooperative growth illegal. *See United States v. Rock Royal Co-op, Inc., supra,* 307 U.S. at 560.

This is the interpretation that has been placed upon Capper-Volstead by practically every scholar in the antitrust field.[5] This is how those courts which have directly

[5] *See* 1 Areeda & Turner, *Antitrust Law* ¶ 228d (1978); 1 Callman, *The Law of Unfair Competition Trade Marks and Monopolies*

addressed the issue have construed the Act. In *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., supra,* 370 U.S. at 24, the Court noted with apparent approval that portion of the district court's charge which stated that cooperatives could lawfully have a monopoly of the fruit and products in which they dealt.[6] In *Maryland and Virginia Milk Producers Association v. United States, supra,* 362 U.S. at 465, the Court said that farmers might act together in cooperative associations without the associations as such being illegal under the antitrust laws "as they otherwise might have been." Justice White expressed the same thought when he said that "[t]he assistance offered farmers by the Capper-Volstead Act was to allow combination in a way that would otherwise violate the antitrust laws," and concluded that the end result was a "bilateral monopoly" that benefited both the producer and the consumer. *National Broiler Marketing Assn. v. United States, supra,* 436 U.S. at 842, (White, *J.*, dissenting). *See also Treasure Valley Potato Bargaining Association v. Ore-Ida Foods, Inc., supra,* 497 F.2d at 216 n.11; *Sunkist*

---

§ 15.2(a) (1967 & Cum. Supp. 1979); 2 Kintner, *Federal Antitrust Law* § 17.5, at 517-18 (1980); Mueller, *The National Antitrust Commission: Implications for Cooperatives*, No. 37 (Dept. of Agricultural Economics, University of Wisconsin-Madison, September 1979); 5 Toulmin, *Antitrust Laws* § 6.13 (1950); 7 Von Kalinowski, *Antitrust Laws and Trade Regulations* § 51.08[3][b] (1980); Hufstedler, *A Prediction: The Exemption Favoring Agricultural Cooperatives Will Be Reaffirmed*, 22 Ad. L. Rev. 455, 460 (1969-1970).

6 The district court actually charged that "[t]he defendant Sunkist is permitted under the law to acquire a legal monopoly over product Valencia oranges that are available for processing into citrus juice products, including single-strength Valencia juice." *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 284 F.2d 1, 19 (9th Cir. 1960), *rev'd*, 370 U.S. 19 (1962).

Growers, Inc. v. F.T.C., 464 F. Supp. 302, 309 (C.D. Cal. 1979); *Shoenberg Farms, Inc. v. Denver Milk Producers, Inc.*, 231 F. Supp. 266, 268 (D. Colo. 1964); *Cape Cod Food Products, Inc. v. National Cranberry Ass'n*, 119 F. Supp. 900, 907 (D. Mass. 1954); *United States v. Dairy Co-Op Ass'n*, 49 F. Supp. 475 (D. Ore. 1943); *United States v. King*, 250 F. 908, 910 (D. Mass. 1916).

Even the Federal Trade Commission, ever in the vanguard of the attack on monopolization, has stated that if an agricultural cooperative attains a monopoly position (even 100 percent) "without resort to predatory or anti-competitive practices, but through natural growth or the voluntary affiliation with or attraction of new members, no illegality would attach." *See Hearings on Antitrust Aspects of Food Price Increases Before the Sub-Comm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 93rd Cong., 1st Sess. 715 (1973).

Of course, a cooperative may neither acquire nor exercise monopoly power in a predatory fashion by the use of such tactics as picketing and harassment, *Otto Milk Co. v. United Dairy Farmers Cooperative Association*, 338 F.2d 789, 797 (3d Cir. 1967), boycotts, *North Texas Producers Association v. Metzger Dairies, Inc.*, 348 F.2d 189, 195-96 (5th Cir. 1965), *cert. denied*, 382 U.S. 977 (1966), coerced membership, *see Gulf Coast Shrimpers and Oystermans Association v. United States*, 236 F.2d 658, 665 (5th Cir.), *cert. denied*, 352 U.S. 927 (1956), and discriminatory pricing, *Knuth v. Erie-Crawford Dairy Cooperative Association*, 395 F.2d 420, 423-24 (2d Cir. 1968). Neither may it use its legitimately acquired monopoly power in such a manner as to stifle or smother competition. *Maryland and Vir-*

ginia Milk Producers Association v. United States, supra, 362 U.S. at 463.

> "[M]any anticompetitive actions are possible or effective only if taken by a firm that dominates its smaller rivals. A classic illustration is an insistence that those who wish to secure a firm's services cease dealing with its competitors. Such conduct is illegal when taken by a monopolist because it tends to destroy competition, although in the hands of a smaller market participant it might be considered harmless, or even 'honestly industrial.'" *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 274 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 1061 (1980) (citations omitted).

In refusing to dismiss the section 2 claims, the district court relied on *Grinnell v. United States, supra*, which stated the following requirements for a monopolization claim:

> The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

384 U.S. at 570-71. Our review of the above authorities persuades us that the effect of Capper-Volstead is to prevent the full application of the second element of this test to agricultural cooperatives. Capper-Volstead permits the formation of such cooperatives and places no

limitation on their size. As the cooperative grows, so, normally, does its power over the market. Thus, while the formation, growth and operation of a powerful cooperative is obviously a "willful acquisition or maintenance of such power," and will rarely result from "a superior product, business acumen, or historic accident," *id.*, it is exactly what Capper-Volstead permits.

We conclude that *Grinnell* does not apply to monopoly power that results from such acts as the formation, growth and combination of agricultural cooperatives, but applies only to the acquisition of such power by other, predatory means. It is not a violation of the Sherman Act for the members of an agricultural cooperative to carry out the legitimate objectives of their association which follow naturally from their attempts to achieve unity of effort and the voluntary elimination of competition among themselves. *Maryland and Virginia Milk Producers Association v. United States, supra*, 362 U.S. at 465. *See Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 635 (1975).

That part of the district court's order which granted defendants summary judgment on plaintiff's claim of a section 1 Sherman Act violation is affirmed. Because it is not clear whether the district court denied defendants' motion for summary judgment dismissing the section 2 count on the premise that the mere accretion of power from formation of a cooperative is sufficient to violate that section or on the ground that predatory acts had been sufficiently shown, that part of the order is vacated, and the matter is remanded to the district court for reconsideration consistent with the principles set forth in this opinion. We express no opinion concern-

ing the district court's ultimate resolution of this portion of defendants' summary judgment application.[7]

[7] There are those who contend that the economics of farming have changed so drastically in recent years through farm growth and mechanization that the Capper-Volstead Act is no longer needed to equalize bargaining power. *See* Toulmin, *supra* note 5, at 334; Note, *Trust Busting Down on the Farm: Narrowing the Scope of Antitrust Exemptions for Agricultural Cooperatives*, 61 Va. L. Rev. 341, 381-89 (1975). It is for Congress, not the courts, to determine whether there is sufficient merit in this argument to warrant a redesign of the statute.

Second Opinion of the United States District Court for the District of Vermont

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Civil Action File No. 75-140

FAIRDALE FARMS, INC.,

v.

YANKEE MILK, INC. and REGIONAL COOPERATIVE MARKETING AGENCY, INC.

OPINION AND ORDER

Plaintiff Fairdale Farms, Inc. (Fairdale) is a dairy products producer and handler. Defendant Yankee Milk, Inc. (Yankee) is a diary farmer cooperative with member producers throughout New England and eastern New York. Yankee is a founding member of defendant Regional Cooperative Marketing Agency, Inc. (RCMA), an association of cooperatives in the Northeast that was formed to fix the prices at which member cooperatives could sell their milk and to distribute among the cooperatives the additional income resulting from that price fixing.

In an Opinion and Order dated November 1, 1979, this court granted defendants' motions for summary judgment as to count one of plaintiff's amended

complaint (alleging violation of section 1 of the Sherman Act, 15 U.S.C. §1), and denied defendants' motions for summary judgement as to count two (alleging violation of section 2 of the Sherman Act, 15 U.S.C. §2). In refusing to dismiss the section 2 claim, the court applied the monopoly test enunciated in *United States v. Grinnell Corp.*, 384 U.S. 563 (1965):

> The offense of monopoly under §2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Id. at 570-71. We held that the Capper-Volstead Act, 7 U.S.C. §§291, 292, did not require plaintiff to show that defendants have engaged in predatory practices.

The court certified an appeal under 28 U.S.C. §1292(b), and each party sought review by the Second Circuit Court of Appeals. The Court of Appeals affirmed this court's disposition of count one and vacated this court's denial of defendants' motions for summary judgment on count two. *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037 (2d Cir. 1980), *cert. denied*, 102 S. Ct. 98 (1981). The Court of Appeals rejected this court's application of *Grinnell*. Persuaded that the Capper-Volstead Act "prevent[s] the full application" of the second element of the *Grinnell* test to agricultural cooperatives, the Court of Appeals concluded:

> *Grinnell* does not apply to monopoly power that results from such acts as the formation, growth and

> combination of agricultural cooperatives, but applies only to the acquisition of such power by other, predatory means. It is not a violation of the Sherman Act for the members of an agricultural cooperative to carry out the legitimate objectives of their association which follow naturally from their attempts to achieve unity of effort and the voluntary elimination of competition among themselves.

635 F.2d at 1045. The Court of Appeals remanded the matter to this court for reconsideration of plaintiff's section 2 claim consistent with the principles set forth in its opinion.

Congress enacted the Capper-Volstead Act with "a purpose to make it possible for farmer-producers to organize together, set association policy, fix prices at which their cooperative will sell their produce, and otherwise carry on like a business corporation without thereby violating the antitrust laws." *Maryland and Virginia Milk Producers Association, Inc. v. United States*, 362 U.S. 458, 466 (1960). The Act permits an agricultural cooperative—in order to benefit from the same unified competitive advantage available to businessmen acting through corporations—to attain a monopoly position through voluntary and natural growth. However, as stated by the Court of Appeals, "a cooperative may neither acquire nor exercise monopoly power in a predatory fashion by the use of such tactics as picketing and harrassment, . . . boycotts, . . . coerced membership, . . . and discriminating pricing . . . Neither may it use its legitimately acquired monopoly power in such a manner as to stifle or smother competition." 635 F.2d at 1044.

The issue before the court is whether plaintiff has alleged sufficiently anticompetitive conduct to warrant proceeding to trial on its section 2 claim.

Before examining plaintiff's specific allegations of misconduct, we must address plaintiff's assertion that, under a recent Sixth Circuit case, it need not show that defendants have engaged in "hard-core predatory activities." In *United States v. Dairymen, Inc.*, 660 F.2d 192 (6th Cir. 1981), the Sixth Circuit held that the district court "set too high a burden" on the plaintiff when it required the plaintiff to show that the agricultural cooperatives' anticompetitive conduct "rose to the level of predatory practices, *i.e.*, anticompetitive practices without any business justification." *Id.* at 194. The court centered inquiry on whether the cooperatives' conduct was intended to stifle competition or was an effort to advance the legitimate business purposes recognized by section 1 of the Capper-Volstead Act, 7 U.S.C. §291. The court articulated the following test: "The offense of attempt to monopolize requires only that the defendant has engaged in anticompetitive conduct with a specific intent to monopolize and that there was a dangerous probability that the attempt would be successful." *Id.*

We do not read *Dairymen* as diluting the plaintiff's pleading burden in a section 2 claim against an agricultural cooperative. The *Dairymen* court emphasized that the Capper-Volstead Act does not immunize measures taken to achieve an unlawful goal from illegality under the antitrust laws merely because they may have a rational business justification. Thus, the case

accords with the principle expounded by the Second Circuit Court of Appeals that a plaintiff charging an agricultural cooperative with monopolization must allege predatory conduct designed to achieve ends not legitimized by the Capper-Volstead Act. *See* 635 F.2d at 1045.

Plaintiff asserts that a factual issue exists as to whether defendants engaged in conduct directed at smothering competition. Specifically, it argues that three practices allegedly followed by defendants indicate predation: boycotts and threatened boycotts, acquisitions "among" cooperatives to achieve market dominance, and discriminatory pricing.

As evidence of a boycott or threatened boycott, plaintiff traces the chain of events leading up to plaintiff's announcement on December 24, 1974, that it would cease purchasing milk from Yankee members as of January 1, 1975. Before discontinuing its relationship with Yankee, plaintiff purchased approximately forty percent of its milk supply from Yankee members. Because of a severe cost-price squeeze on its Massachusetts supermarket business, in June 1974, plaintiff sought an exception to the premium set by RCMA and charged to all handlers. Yankee granted an exception for September 1974 but refused to extend it to subsequent months. When Plaintiff did not make RCMA payments demanded by Yankee, Yankee threatened to pull the milk of its members who were shipping to Fairdale. Yankee informed Fairdale it would not implement the pull order pending attempts to resolve the controversy. On December 13, 1974, some Yankee members were apparently instructed to withhold their

milk from shipment to Fairdale, but Yankee rescinded the orders, assuring Fairdale that the orders had been given in error. On December 24, 1974, representatives of Yankee and Fairdale met to discuss the situation. Fairdale requested assurances that it would receive 45 days notice of any termination of its milk supply by Yankee. Yankee refused to give these assurances. Fairdale replied that it could not tolerate day-to-day uncertainty in forty percent of its milk supply, and announced that it would terminate relations with Yankee.

In rejecting plaintiff's claim under section 1, this court determined that RCMA legally fixed the prices at which Yankee members would sell their milk. Yankee's refusal to sell milk to plaintiff at less than a lawful price is not a "boycott;" it is a proper means to effectuate a purpose of the Capper-Volstead Act. *See GVF Cannery, Inc. v. California Tomato Growers Association, Inc.*, 511 F.Supp. 711, 716 n.1 (N.D. Cal. 1981).

The second allegedly predatory practice is Yankee's effort to amalgamate cooperatives in order to acquire greater control over the New England milk market. Such an attempt to monopolize has long been held to be immunized by the Capper-Volstead Act: "It is not unlawful under the antitrust acts for a Capper-Volstead cooperative . . . to try to acquire even 100 percent of the market if it does it exclusively through marketing agreements approved under the Capper-Volstead Act . . . ." *Cape Cod Food Products, Inc. v. National Cranberry Association*, 119 F.Supp. 900, 907 (D. Mass. 1954). Mere assertion of monopoly power is not a predatory practice.

Finally, plaintiff contends that, having attained monopoly power, defendants used this power to obtain unreasonably high prices in the form of over-order premiums. Plaintiff asserts that defendants' over-order pricing was predatory because the price was too high. Ordinarily, a lawful monopolist may charge as high a price for its product as the market will accept. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 274 n.12 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). The Capper-Volstead Act enables farmers to market their products through cooperatives in order to obtain a price higher than the market might otherwise bear. *Milk Producers Association*, 362 U.S. at 466. Since defendants' pricing policy promotes a proper Capper-Volstead purpose, it is immune from challenge under the antitrust laws.

Because plaintiff raises no genuine issue as to any fact material to the question of whether defendants engaged in predatory conduct, we hold that defendants are entitled to judgment as a matter of law on plaintiff's section 2 claim.

Dated at Burlington in the District of Vermont, this 7th day of April, 1982.

/s/ ALBERT W. COFFRIN
District Judge

Second Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Cal. No.: 813—August Term, 1982

(Argued January 24, 1983 Decided August 8, 1983)

Docket No. 82-7698

FAIRDALE FARMS, INC.,

Plaintiff-Appellant,

—v.—

YANKEE MILK, INC. and
REGIONAL COOPERATIVE MARKETING AGENCY, INC.,

Defendants-Appellees.

Before:

LUMBARD, VAN GRAAFEILAND and PIERCE,
Circuit Judges.

Appeal from a summary judgment of the United States District Court for the District of Vermont, Coffrin, J., dismissing appellant's antitrust complaint. Affirmed.

SUSAN F. EATON, Middlebury, Vt. (Langrock Sperry Parker & Wool, Middlebury, Vt., and Chapman & Clearwaters, Washington, D.C., Fred I. Parker and Keith I. Clearwaters, of Counsel), *for Plaintiff-Appellant Fairdale Farms, Inc.*

JOHN M. FREYER, Syracuse, N.Y., (Bond, Schoeneck & King, Ronald C. Berger and Ronald G. Hull, Syracuse, N.Y., of Counsel), *for Defendant-Appellee Regional Cooperative Marketing Agency, Inc.*

FREDERICK U. CONARD, JR., Hartford, Ct., (Shipman & Goodwin and Theodore M. Space, Hartford, Ct., of Counsel), *for Defendant-Appellee Yankee Milk, Inc.*

VAN GRAAFEILAND, *Circuit Judge*:

Fairdale Farms, Inc. appeals from a summary judgment of the United States District Court for the District of Vermont (Albert W. Coffrin, J.) dismissing its antitrust complaint against appellees, Yankee Milk, Inc. and Regional Cooperative Marketing Agency, Inc. We affirm.

Appellant is a dairy products producer and processor located in Bennington, Vermont, which purchases raw milk from other producers in Bennington County, Berkshire County, Massachusetts, and Rensselaer County, New York. Appellee, Yankee Milk, is a dairy farmer cooperative with members in New England and eastern New York. Yankee and six other cooperatives in the New

England-New York area are associated in the Regional Cooperative Marketing Agency, Inc. (RCMA). Since 1973, RCMA has acted as a common marketing agency for its members.

In 1975, Fairdale began this action against Yankee, alleging that Yankee and RCMA had conspired to fix the price of raw milk and had monopolized and attempted to monopolize the raw milk trade in the three county area in which Fairdale procures its milk, all in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1976). Yankee joined RCMA as a necessary party. In 1979, the district court granted defendants' motions for summary judgment on the section 1 price-fixing claim but denied their motions on the section 2 monopolization claim. The court certified the case for interlocutory appeal. 28 U.S.C. § 1292(b). This Court affirmed the district court's dismissal of the price-fixing claim, but vacated and remanded on the monopolization claim. *Fairdale Farms, Inc. v. Yankee Milk, Inc.*, 635 F.2d 1037 (2d Cir. 1980), *cert. denied*, 454 U.S. 818 (1981).

The district court had ruled that the latter claim was to be tested by the usual monopolization standards of *United States v. Grinnell Corp.*, 384 U.S. 563 (1966). That case held that a claim under section 2 was made out if the plaintiff established "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident." *Id.* at 570-71. We held that the effect of the Capper-Volstead Act, 7 U.S.C. §§ 291-92, "is to prevent the full application of the second element of this test to agricultural cooperatives," so that the acquisition, maintenance, or exercise of monopoly power by "predatory

means" only was proscribed. 635 F.2d at 1045. Because we could not determine "whether the district court denied defendants' motion for summary judgment dismissing the section 2 count on the premise that the mere accretion of power from formation of a cooperative is sufficient to violate that section or on the ground that predatory acts had been sufficiently shown," *id.*, the order of denial was vacated and remanded for reconsideration. Upon remand and defendants' renewal of their motions for summary judgment, the district court dismissed the complaint, holding that plaintiff had raised no material questions of fact as to whether defendants had engaged in predatory conduct.

RCMA Pricing Policies

Appellant contends that RCMA set its over-order premium so high as to constitute a predatory policy. The over-order premium was the amount by which RCMA prices exceeded the market order minimum prices set by the United States Department of Agriculture and State regulatory agencies. Relying in part upon our decision in *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 294 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), the district court properly rejected that argument. As we stated in *Berkey*, "there is probably no better way for [a monopolist] to guarantee that its dominance will be challenged than by greedily extracting the highest price it can." *Id.* It may be, as appellant contends, that market forces will not correct over-pricing in the cooperative milk trade as rapidly as they might in others. Congress wisely has protected against this possibility, however, by authorizing the Secretary of Agriculture to issue a cease and desist order against any monopolization by a cooperative

which has "unduly enhanced" the price of any agricultural product. 7 U.S.C. § 292.

In enacting the Sherman Act, Congress recognized that the "reasonableness of prices has no constancy." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940). "The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow," *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927), and courts are poorly equipped to undertake the "heavy, continuous, and unguided burden" of determining reasonableness, III Areeda and Turner, *Antitrust Law* ¶ 710, at 149 (1978); *see* Sullivan, *Handbook of the Law of Antitrust* 117-18 (1977). It is not surprising, therefore, that Congress did not ask the courts to determine "whether or not particular price-fixing schemes are wise or unwise, healthy or destructive." *Socony-Vacuum Oil Co.*, *supra*, 310 U.S. at 221. Instead, the Sherman Act makes every combination formed for the purpose of raising the price of a commodity illegal per se. *Id.* at 223.

The Capper-Volstead Act was enacted to provide an exception from this rule for agricultural cooperatives. *Fairdale I*, *supra*, 635 F.2d at 1039. Had Congress intended that the federal courts were to act as regulatory bodies in setting upper monetary limits for this exception, it easily could have said so. It did not. Although the Capper-Volstead Act has not relieved us of our duty to outlaw "competition-stifling practices", *Maryland and Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458, 463 (1960), we fail to see how an increase in prices by an agricultural cooperative stifles competition by other cooperatives or individual farmers. Appellant's contention that appellees' imposition of over-order premiums constitutes a "predatory practice" against the consumer

misinterprets the meaning of that phrase as it is used in *Fairdale I*, *supra*, 635 F.2d at 1044, and *United States v. Dairymen, Inc.*, 660 F.2d 192, 194 (6th Cir. 1981). "Predatory practices", as discussed in those and similar cases, are not aimed at consumers, but at "an identifiable competitor or potential competitor or an identifiable group of them." Sullivan, *supra*, at 112. Although, in some instances, the charging of unremunerative prices may damage or destroy competition, *Northeastern Tel. Co. v. American Tel. and Tel. Co.*, 651 F.2d 76, 86 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982), excessively high pricing hardly is likely to accomplish the same result.

We likewise find no merit in appellant's argument that appellees violated section 2 because they charged different premiums in the several milk-marketing areas which they served. The Secretary of Agriculture sets minimum milk prices for each federal marketing area which are not nationally uniform, nor, indeed, necessarily uniform within the marketing area itself, financial allowances being permitted for those producers in an area who provide an economic service or benefit to the handler. *Schepps Dairy, Inc. v. Bergland*, 628 F.2d 11, 15 (D.C. Cir. 1979). However, producers are permitted to bargain with handlers for higher prices, or over-order premium charges. *Id.* A similar situation exists in State-regulated areas, one of which includes Berkshire County, Massachusetts.

The basic requirement for successful cooperative marketing is the control or handling of a substantial part of a commodity in the market involved. *Fairdale I*, *supra*, 635 F.2d at 1041-43. It would be self-defeating for a cooperative to raise its prices when its share of the market is so small as to leave it without bargaining power. It is undisputed that appellees did not have the bargaining

power in the large New York-New Jersey marketing area to enable them successfully to impose over-order premium charges. *See Zuber v. Allen*, 396 U.S. 168, 173 n.4 (1969). Appellant contends, nonetheless, that appellees' failure to impose over-order premium charges in New York precluded them from imposing such charges in the New England marketing area. We disagree.

Governmentally defined marketing areas for fluid milk create natural boundaries for price differentials. Fairdale has made no showing that appellees' pricing in the New York-New Jersey market was below their cost or was designed in some manner to eliminate competition by predatory means. *See* Areeda and Turner, *supra*, ¶ 720, at 187. Absent any showing that appellees were moving milk from the New York marketing area into the New England marketing area to compete with Fairdale and given appellees' lack of bargaining power in the New York area, there was nothing predatory in the premium charges which appellees imposed uniformly in the Berkshire County area where appellant purchased milk. To hold otherwise would be to defeat the very purpose of the Capper-Volstead Act. *See Kinnett Dairies, Inc. v. Dairymen, Inc.*, 512 F. Supp. 608, 633-34 (M.D. Ga. 1981); *GVF Cannery, Inc. v. California Tomato Growers Ass'n*, 511 F. Supp. 711, 715-16 (N.D. Cal. 1981).

Refusal to Deal

Yankee first began charging the RCMA premium to Fairdale in the second half of 1973. The premium was imposed at all relevant times only with respect to milk produced by Yankee members in Berkshire County. In the Spring of 1974, a New York handler, Normanskill Dairy, began preparations to enter the Berkshire market. By

purchasing in New York, where the Government minimum price was lower than in Berkshire County and where RCMA could not impose its premium because of competition, Normanskill would be able to offer prices to potential Berskshire customers that were lower than those charged by Fairdale. Seeking to forestall this competition by lowering its own prices, Fairdale asked Yankee for an exemption from the RCMA premium. Yankee granted an exemption to Fairdale, but for one month only. When the premium was reimposed, Fairdale refused to pay it. Although Yankee warned Fairdale that it would cease to deliver any more milk unless the Berkshire premiums were paid, milk deliveries continued while the matter was being negotiated.

In December, 1974, Fairdale learned from two Yankee members that Yankee's management had ordered them to withhold milk deliveries to Fairdale. Upon inquiry, Fairdale learned that the order had been given in error and already had been rescinded. At the next negotiating session, Fairdale demanded that Yankee promise to give Fairdale forty-five days prior notice of any termination of its milk supply. Upon Yankee's refusal to give such assurance, Fairdale, professing its inability to live with resultant supply uncertainties, discontinued its relations with Yankee as of December 31, 1974.

Fairdale says Yankee's threat to sell it no more milk was a predatory practice. Because the dispute concerned only Yankee milk produced in Berkshire County, Fairdale contends Yankee had no reason to refuse to sell it milk purchased in Vermont and New York, about which there was no price dispute. Since only 40% of Fairdale's milk purchases were from Yankee, no reasonable contention can be made that Yankee was cutting Fairdale off from all sources of supply. Moreover, although Vermont producers

were getting the Vermont Milk Control Board price, which included the equivalent of an RCMA premium, no such premium was charged in eastern New York, only a short distance from Bennington. *See Kinnett Dairies, Inc. v. Dairymen, Inc.*, *supra*, 512 F. Supp. at 624-25. Section 2 of the Sherman Act does not give purchasers the exclusive right to dictate the terms upon which they will deal. Yankee, which did not have a monopoly covering both the New York and New England areas, lawfully might refuse to sell to a purchaser which would not meet its terms of sale and which had other sources of supply available. *Kinnett Dairies, Inc. v. Dairymen, Inc.*, *supra*, 512 F. Supp. at 632; *GVF Cannery, Inc. v. California Tomato Growers Ass'n*, *supra*, 511 F. Supp. at 716. Such conduct cannot be considered an unlawful use of lawfully acquired monopoly power. *See Fairdale I*, *supra*, 635 F.2d at 1044. If anything, Yankee's action in terminating all business relationships with Fairdale necessarily created an added market for its competitors. *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F.2d 867, 871 (2d Cir. 1962).

Fairdale's argument that a processor who refuses to pay overdue premium charges nonetheless is entitled to forty-five days' notice before future deliveries can be cancelled, is specious. There is nothing predatory in terminating deliveries to a purchaser who refuses full payment therefor, particularly where other purchasers are required to and do pay the full price. As a matter of fact, it was not Yankee, but Fairdale, which terminated their business relationship, and it did so on one week's notice.

The judgment of the district court is affirmed.

Appendix—Second Opinion of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

for the

Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of August one thousand nine hundred and eighty-three.

U.S. District Court
District of Vermont
Sep 6 1:32 PM '83
Clerk
By CroB
Deputy Clerk

Present:

HON: J. EDWARD LUMBARD
HON: ELLSWORTH A. VANGRAAFEILAND
HON: LAWRENCE W. PIERCE
Circuit Judges,

Filed
Aug 8 1983
A. Daniel Fusaro, Clerk
United States Court of Appeals
Second Circuit

Appendix—Second Opinion of the United States Court of Appeals for the Second Circuit.

FAIRDALE FARMS, INC.,
Plaintiff-Appellant,

v.

YANKEE MILK, INC., and REGIONAL COOPERATIVE MARKETING AGENCY, INC.,
Defendants-Appellees.

82-7698.

Appeal from the United States District Court for the _____ District of Vermont.

This cause came on to be heard on the transcript of record from the United States District Court for the _____ District of Vermont, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk
by: EDWARD J. GUARDARO
Deputy Clerk

A TRUE COPY
A. DANIEL FUSARO, CLERK
By FRANCIS A. GUIDHART
Chief Deputy Clerk